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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 27

THE STEWART DRY GOODS COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

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[fol. 1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

THE STEWART DRY GOODS COMPANY, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, and HENRY M. CLINE, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Jan. 24, 1931

The plaintiff, The Stewart Dry Goods Company, a corporation organized under the laws of Kentucky, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

[fol. 4] 1

The plaintiff, The Stewart Dry Goods Company, is now and at all times herein mentioned it was, and since the year 1892 it has been, a corporation duly created, organized and existing under the laws of the Commonwealth of Kentucky, with its principal office and only place of business in the city of Louisville, Kentucky, and a citizen and resident of the Commonwealth or State of Kentucky, and an inhabitant of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and

at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the [fol. 5] Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall [fol. 6] be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiff and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, or from instituting any prosecution against the plaintiff or any [fol. 7] of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act. . . .

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Ken-

tucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for [fol. 8] each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of chain [fol. 9] stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its

passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 10] V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose, of said House Bill 111 was changed by amendment by the Committee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

[fol. 11] VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or [fol. 12] ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand $900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under [fol. 13] the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

[fol. 14] "§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the

tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made [fol. 15] taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any [fol. 16] prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or

shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improve-[fol. 17] ments for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time with two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the

amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act [fol. 18] provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The plaintiff herein, for nearly forty years continuously last past, and its predecessors in interest since 1846, have been engaged in conducting one retail store in Kentucky, the same being located in Louisville, Kentucky, wherein it handles and sells, exclusively at retail, merchandise of the following general character:

(1) Piece dry goods, such as silks, velvets, dress goods, wash goods, linens, etc.

(2) Laces, ribbons, notions, toilet goods, books, art goods, etc.

(3) Handkerchiefs, hosiery, gloves, underwear, millinery, corsets, shoes, etc.
(4) Women's ready-to-wear garments.
(5) Men's and Boys' furnishings, etc.
(6) House furnishings.
[fol. 19] (7) And also operates two lunch rooms, in which it sells lunches.

Plaintiff is not engaged in manufacture of any kind. It has never owned or operated or conducted any other store than the one, which for 84 years past has been located in Louisville, Kentucky, and for more than twenty years past has been located at the corner of Fourth and Walnut Streets in that city.

Plaintiff conducts in its retail store what is known as a department store, embracing approximately 70 separate departments, in which separate departments it sells at retail merchandise of various kinds, of which the following are illustrations:

Silks and velvets,
Pianos,
Gloves,
Toys and Sporting Goods,
Women's Hosiery,
Chinaware,
Books,
Millinery,
Upholstery,
Muslin Underwear,
Furniture,
Rugs and Carpets,
Men's Furnishings,
Shoes.

Each of said departments is operated by the plaintiff separately from other departments, and plaintiff's books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, in-
[fol. 20] cluding its proper proportion of rental, taxes, insurance and all other overhead expense, and the net results of such operation of each department, to the end that plaintiff may determine, after allocating to each department its

proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in Louisville and in other cities in Kentucky, and the same is true as to each department operated by plaintiff in its retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewehre in Kentucky, and such competition applies not only to the plaintiff's conduct of its store as a whole but as to each unit or department therein.

[fol. 21] VIII

In addition to the several departments separately conducted by plaintiff itself in its retail store building, plaintiff has for more than 30 years last past leased floor space in its said store to Herbert Tashgian, to whom it furnishes light, heat, janitor and elevator service, storage, billing, credit rating, collection and other like services, all for a valuable consideration expressed in the contract between plaintiff and said lessee, but in all other respects, said lessee conducts for himself his own retail store in his leased space. Said lessee owns and operates in said leased space his own stock for the sale of Oriental rugs. He selects his own stock of goods, and buys them for himself, employs, discharges and pays his own salesmen or assistants, fixes the selling prices of his own goods, pays his own taxes upon his own goods, and in all essential respects manages and conducts his own store as the proprietor thereof, though conducted in the same building as the store of this plaintiff and its various departments.

IX

For many years past, plaintiff has kept its entire capital invested in the retail store conducted by it in Louisville, Kentucky. For nearly 40 years it has been a large taxpayer to the State of Kentucky and the city of Louisville and the County of Jefferson. It has paid all annual ad [fol. 22] valorem taxes levied thereon by competent authority for State, County and city purposes. It has exerted itself with the utmost diligence and prudence to build up its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiff.

To do this has required of the plaintiff the closest attention to every phase of its business, including the most careful foresight as to the class or style of goods it should stock in its store and in each department thereof to attract the public and to satisfy its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonable in character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiff has been obliged to expend each year, in the community served by it, [fol. 23] large amounts of money for advertising in newspapers and for trade solicitation by personal letters to its customers, and circulars to the public generally, and has also expended large sums of money in the employment of skilled and competent persons to decorate its show-windows and make an inviting display of its merchandise in its windows and in its store, and in the purchase of the proper equipment for such purposes. Only by such progressive

methods and by the policy of continued fair dealing with the buying public, has the plaintiff been able to build up its business and to take its own proper part in building up its city and State.

Likewise plaintiff has for many years past actively interested itself in all forms of civic, cultural, religious and welfare work carried on in its City and State, and contributed largely of its means and of the time of its officers. Its Vice-President, William B. Pirtle, has been a member of the City Planning and Zoning Commission of Louisville from its organization, serving without pay, and all its officers and employes have taken their part in public activities.

Plaintiff keeps its money on deposit in banks located in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so.

Plaintiff has more than 500 employes at all times, ranging as high as 750 employes during the holiday trade. It pays them the highest current compensation for services of the kind rendered by them. Two hundred and twenty of [fol. 24] its employes have been with it continuously for more than five years. One of its employes has been with it and its predecessors 63 years. He is virtually a pensioner, and others are actually pensioned by it. Near the end of each calendar year, it gives to each employe a bonus proportioned to services rendered and their duration. Every employe in its service for as much as a year gets a vacation of two weeks on full pay, and every employe in service for as much as six months gets a vacation of one week on full pay.

X

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the State of Kentucky for the calendar year 1930 (not mentioning similar taxes paid for prior years) the following special State licenses, excises, occupational and corporation license taxes:

Corporation License Tax	$977.07
Other License Taxes	31.00
Automobile License Taxes	271.04
Total	$1,279.11

XI

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to [fol. 25] any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent [fol. 26] upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

XIII

During the calendar year 1930, the total gross retail sales made by plaintiff in all departments conducted by it in its

retail store aggregated $3,821,636.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930 (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	22,097.17 Tax
Total tax above computed	$25,147.17
Credits allowed under § 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06

[fol. 27] If to plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, as the defendants herein construe said challenged Act to require (which construction is challenged by plaintiff and by said Tashgian, its lessee, as improper, unwarranted and, moreover, as making the challenged Act, if so construed, void in that respect as a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and likewise violative of the Kentucky Constitution), then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amount to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, and the effect will be to tax the additional sales made by plaintiff's lessee all in

the highest bracket of 1 per cent, thus making an additional tax demanded of plaintiff and/or its lessee, by defendants, of $289.29, which is 20 times the amount that such lessee or plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said Tashgian were treated as his own separate retail store and taxed accordingly under said Act.

[fol. 28] XIV

Each of the separate departments conducted by plaintiff in its retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by this plaintiff in the particular department of its store handling or selling that class or line of goods. In no one department conducted by this plaintiff in its retail store do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $250,000, nor do the gross annual sales of any specialized retail store in Kentucky competing with any of the departments in plaintiff's store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against this plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiff are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at [fol. 29] 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of this plaintiff's department competing with said specialized single store are added to its gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided

in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of this plaintiff's departments in its retail store.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments of its retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under [fol. 30] the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically [fol. 31] all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act, and they constitute a very small class of limited number in Kentucky. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax ex- [fol. 32] ceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of its departments in

competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiff's store and thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store, and the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

[fol. 33] XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations [fol. 34] owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under

one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by this plaintiff in its retail store and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by this plaintiff in its retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be [fol. 35] paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for

some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class [fol. 36] and quality, at similar price, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence this plaintiff, by reason of its operation of a department store and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the store of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiff's store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff [fol. 37] have, by reason of their advantages, made substantial inroads and encroachments upon the trade of this plaintiff in its various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation

against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one [fol. 38] per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar- increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales

are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having [fol. 39] total sales of six hundred thousand dollars; for the next one hundred thousand dol-ars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar- increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classi- [fol. 40] fication does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the

net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, [fol. 41] or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising

[fol. 42] and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

[fol. 43] XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business meth-

ods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested [fol. 44] capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiff and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of this plaintiff and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by this plaintiff and other retail merchants similarly situated and, as far as possible under said Act, to divert trade and custom from the retail stores of this plaintiff and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed at rates very much lower than those exacted [fol. 45] by said Act of this plaintiff and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in uniformity in its application to the persons or occupations taxed thereunder, and it designedly transfers

to and imposes upon this plaintiff and all other retail merchants similarly situated an undue proportion and practically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by this plaintiff and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to this plaintiff and other retail merchants similarly situated the equal protection of the laws guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

[fol. 46] XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest [fol. 47] to many persons, as hereinbefore set forth, con-

stituting a class so numerous as to make it impracticable to bring them all before the Court herein, and this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against this plaintiff or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against this plaintiff or any of said other retail merchants on whose behalf this suit is brought.

While it is impracticable to bring them all before the Court, plaintiff names herein some of the other retail merchants similarly situated and belonging to the class of retail merchants doing business in Kentucky, on whose behalf plaintiff brings this suit, as follows:

J. Bacon & Sons.
H. P. Selman Company.
Kaufman-Straus Company.
Herman Straus & Sons Company.
John C. Lewis Company.
Hook Drug Co.
Rodes-Rapier Co.
Louis Appel Co.
Hubbuch Bros. & Wellendorff.
Lemon & Sons.
S. H. Kress & Co.
Great Atlantic and Pacific Tea Co.
Montgomery, Ward & Co.

[fol. 48] XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent. plus 6 per cent. per annum interest, with a further additional penalty of 20 per cent. if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all

in addition to the penalties imposed by Section 5 of said Act.

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports neces- [fol. 49] sary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Section 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, [fol. 50] which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justi-

fying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the [fol. 51] specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiff says that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the

provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

[fol. 52] (a) It denies to this plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to this plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiff and all other retail merchants similarly situated, and in that it taxes this plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, [fol. 53] persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiff and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

[fol. 54] Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,-

565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

[fol. 55]

XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiff and its officers and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against this plaintiff and its officers and agents the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $23,848.06 as hereinbefore computed and stated, and also to compel this plaintiff and its officers, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against this plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting of $3,209,717.39, upon which, under said Act, a tax would result against this plaintiff of $23,848.06 as hereinabove set out, in addition to the tax of $289.29 hereinabove set out as resulting from the inclusion with plaintiff's gross sales of gross sales made by its lessee, Herbert Tashgian, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to [fol. 56] make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which it

has no plain, adequate and complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

[fol. 57] (3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(4) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the

Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant [fol. 58] upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will possibly decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their re- [fol. 59] spective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal Constitution.

Prayer for Relief.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from [fol. 60] enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482 entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are [fols. 61 & 62] used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the

provisions of this Act,") be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiff.

Duly sworn to by Robert T. McKim. Jurat omitted in printing.

[fol. 63] In United States District Court

Order Permitting Plaintiff to Sue as Representative of Class—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] In United States District Court

Motion for Temporary Restraining Order—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had

upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, and prose- [fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or

servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction,. to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecu-

tion or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 67] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, The Stewart Dry Goods Company, by counsel, and upon its verified Bill of Complaint herein, entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

[fol. 69] (b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the reve-

nue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of 2500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been [fol. 71] wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDERS—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges cannot be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect be-

yond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for plaintiffs.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise", line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act", line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931

* * * * * * *

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follows:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Febr. 14, 1931

Come the defendants John B. Lewis, Seldon R. Glenn and Henry M. Cline, Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts for the Commonwealth of Kentucky, and for their answer to the Bill of Complaint filed in the above styled action, plead as follows:

I

For answer to paragraph one said defendants admit all of the allegations contained in paragraph one of the bill of complaint.

II

For answer to paragraph two said defendants admit all of the allegations contained in paragraph two of the bill of complaint.

[fol. 78] III

For answer to paragraph three defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum and value of $3,000, exclusive of interest and costs. They deny that this suit is of a civil nature, or is brought in equity for the purpose of enjoining the defendants, or any of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the session Acts of 1930, or for the purpose of enjoining the defendants, or any of them, from requiring of the plaintiff or other taxpayers similarly situated as hereinafter set forth, the reports which said act purports to require of retail merchants as the term "retail merchants," is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, or from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated, or from instituting any

prosecution against the plaintiff or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated for a violation of any of the terms of said Act.

IV

For answer to paragraph four defendants deny that House Bill 111, introduced on January 21, 1930, at the regular session of the General Assembly of Kentucky, which provided by its terms for a license or an excise tax upon each merchant doing business in Kentucky, was introduced as "An act to restrain the unfair competition of [fol. 79] chain stores, and aid of individual merchants in the Commonwealth." They deny that such bill was referred to the Committee on Kentucky Statutes, or that it was reported on as "An Act to restrain the unfair competition of chain stores, and aid of Individual merchants of the Commonwealth." They deny that on each of the second and third readings of said bill it was read by the title, "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth." They deny that upon the third reading of said bill by said title it was passed by the House of Representatives, or that after its passage its title was amended, or that it was enrolled after being reported by the enrollment committee under the title "House Bill 111, An Act to restrain unfair competition of chain stores, and aid of individual merchants in the Commonwealth," or that said bill was voted on, signed, passed or enrolled under any other title than that appearing on the enrolled bill in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herein.

V

For answer to paragraph five defendants do not have sufficient information as to the allegations in paragraph five, and therefore, neither admit nor deny but require strict proof thereof.

VI

For answer to paragraph six defendants admit the allegations contained therein.

VII

For answer to paragraph seven defendants do not have sufficient information as to the allegations contained in [fol. 80] paragraph seven, and therefore, neither admit nor deny but require strict proof thereof.

VIII

For answer to paragraph eight defendants do not have sufficient information as to the allegations contained in paragraph eight, and therefore, neither admit nor deny but require strict proof thereof.

IX

For answer to paragraph nine defendants do not have sufficient information as to the allegations contained in paragraph nine, and therefore, neither admit nor deny but require strict proof thereof.

X

For answer to paragraph ten defendants do not have sufficient information as to the allegations contained in paragraph ten, and therefore, neither admit nor deny but require strict proof thereof.

XI

They deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, public welfare, public morals, or public safety, or which, to any extent whatever, increases any fire or police hazard beyond whatever hazard may appertain to other stores handling similar classes of merchandise with one-twentieth of the sales or any volume of gross sales made by plaintiff.

They deny that Chapter 149, Acts of 1930 General Assembly, is purely a tax measure or that it does not purport to be an exercise of the police power of the State, or that [fol. 81] it does not relate to the public health, or the public morals, or the public welfare or the public safety, or that it does not attempt to regulate any business that is affected with a public interest.

They deny that there is no provisions for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax, or that no standards are set up for the conduct of the business of a retail merchant.

XII

For answer to paragraph twelve defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or that, hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately or designedly or otherwise so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or other retail merchants who are thereunder sought to be taxed the rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that it is in its higher brackets of taxation, confiscatory as to this plaintiff or any others similarly situated.

XIII

For answer to paragraph thirteen defendants deny that during the calendar year of 1930, the total gross retail sales made by plaintiff in all or any departments conducted by it in its retail stores aggregated $3,821,639.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930, (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive. [fol. 82] They deny that in applying said gross sales, claimed by said defendants to be subject to taxation under Chapter 149, said Acts of 1930, the graduated rates of taxation prescribed by said Act, or deducting the credits allowed by Section 4 of said Act, would produce the following result:

	Tax
"1/20 of 1% on first $400,000 of sales	$200.00
2/20 of 1% on next $100,000 of sales	100.00
5/20 of 1% on next $100,000 of sales	250.00
8/20 of 1% on next $100,000 of sales	400.00
11/20 of 1% on next $100,000 of sales	550.00
14/20 of 1% on next $100,000 of sales	700.00
17/20 of 1% of next $100,000 of sales	850.00
1% on excess over $1,000,000 of sales	22,097.17
Total tax above computed	$25,147.17
Credits allowed under Section 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06"

They deny that if to the plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amounts to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, or that the effect will be to tax the additional sales made by plaintiff's lessees all in the highest bracket of 1%, thus making an additional tax demanded of plaintiff or its lessee, of $289.29, or that it is 20 times the amount that said lessee of plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said lessee were treated as his own retail store or taxed accordingly under said Act.

[fol. 83] XIV

For answer to paragraph fourteen defendants deny that each of the separate departments conducted by plaintiff in its retail store comes into direct or into any competition with any other specialized individual retail stores in Kentucky dealing mainly or exclusively in any kind or particular class of goods handled or sold by this plaintiff in the particular department of its store handling or selling that class or line of goods.

Defendants not having sufficient information as to the amount of gross annual sales in the departments of plaintiff's retail stores require strict proof as to the allegation in paragraph fourteen herein.

XV

For answer to paragraph fifteen defendants deny that Section 4 of said challenged Act of 1930 contains a provision that in effect, or otherwise, exempts from the payment of any tax thereunder any smaller retail merchants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments in its retail store competing with said retail merchants with the smaller volume of business.

Deny that Sec. 4 of said Act provides in substance, or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereinafter be enacted; that in the case of retail merchants having smaller volumes of sales, such credits are in actual fact or otherwise provided so as to in effect relieve such smaller retail merchants of the payment of any tax whatever under said Act, or in effect provide that the special State license, excise, occupational or corporation license tax exacted from [fol. 84] them under the laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them.

Deny that credits allowed under Sec. 4 of said Act are sufficient in any case to offset entirely or in any part the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or that the allowance of credit by way of tax levied in said Act or graduation of said tax were both or either as provided for in said Act, any part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are very few merchants in Kentucky whose gross annual sales in a single or individually-owned

store exceed $400,000, or that the gross annual sales of practically all such retail merchants are far below $100,000, or that in any instance, are below $50,000.

They deny that in practical effect or operation, or otherwise, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores with two or more, or without departments, or who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act; or that they constitute a small class of limited number in Kentucky, or that there is no just or reasonable basis for the classification of retail merchants.

They deny the average retail merchant conducting a general store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant would pay the State of Kentucky, upon the kind of stock carried in his [fol. 85] general store, special State license or excise taxes aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an actual capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, that it could not or would not be assessed under said Act with a tax exceeding $25, or that it would in any instance be assessed with no tax at all, or that any excise or license tax would in any case be substituted for any tax so imposed upon it by said Act.

They deny that exactly the same annual gross sales made by the plaintiff in one of its departments in competition with said average retail merchants would be added to all other retail gross annual sales made in all other departments of plaintiff's store and subjected to a tax at a rate of 1/20 of one per cent levied by said Act upon the average retail merchant, or that the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

XVI

For answer to paragraph sixteen defendants deny that the design, intent, practical operation or effect of Sec. 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purpose of taxation the gross sales of any stores or departments, although separate or distinct enterprises; or without regard to their location or to the fact that said stores or departments are each engaged in sale at retail of wholly different merchandise or commodities unrelated to the store [fol. 86] or merchandise sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is to tax, penalize, or because of the increased rates of taxation in the higher brackets, is to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership; or to tax, penalize or in effect to prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of ultimate management.

XVII

For answer to paragraph seventeen defendants deny that for many or any years past there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording the so-called individual or single-store retail merchants engaged in Kentucky or elsewhere in the business of selling at retail, goods, wares or merchandise of the character handled or sold by this plaintiff in its retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in material respects as to prices, quality, or kind with merchandise handled or sold by this plaintiff in its retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or organizations, for a small fee, or for any fee, afford to retail mer-

chants operating individual specialized stores throughout Kentucky or elsewhere, affiliated with them, any or all the facilities or advantages in the matter of selection of goods [fol. 87] or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or in any cases such co-operative associations or organizations afford to their employees, members or partons any advantages or facilities along such lines. They deny that such co-operative associations or agencies afford to any retail merchants in Kentucky or elsewhere, affiliated with them, the benefit of their advice or experiences in co-operative action in securing increased results in advertising the goods or such retail merchandise to the buying public, as well as advice or suggestions as to the most approved or advanced methods of selecting goods of the proper style or quality, or for the displaying of such goods in the retail stores of various retail merchants affiliated with such co-operative associations or agencies.

They deny that any retail merchants, owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, or for any time, as part of the economic development of the business of a retail merchant, have availed themselves of the services or facilities thus afforded by such co-operative associations or agencies, or that such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store, or stores, or that they can buy goods of as high class or quality at similar prices as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be less than $400,000 per annum in any retail stores owned or operated by them in Kentucky.

[fol. 88] They deny that the plaintiff, by reason of its operation of a department store or the large volume of gross sales made by it therein, has no advantage over the retail merchants operating a specialized individual store in competition with the store of this plaintiff or any depart-

ment therein, or that any of the said specialized individual stores have annual gross sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiff's store competing with such specialized individual retail merchant.

They deny that the specialized individual merchant has the facilities or better advantages for displaying his merchandise, of whatever character it may be, in a small store located directly on the ground floor with display windows facing directly upon the streets upon which the retail store is located, or that any of the said specialized individual retail stores competing with the plaintiff have made substantial or any inroads or encroachments upon the trade of its plaintiff in its various departments established in Kentucky for any years prior to the opening or establishment of such specialized individual stores. They deny that there is no just, proper or reasonable basis for the classification in matters of taxation between this plaintiff and the retail merchants conducting specialized individual stores.

XVIII

For answer to paragraph eighteen defendants deny that the classification made as a basis for the tax imposed by said Act rests upon the gross retail sales or that the percentage of said tax is increased with each $100,000 of sales above $400,000.00 unequally, disproportionately or arbitrarily, or tends to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency, or the ability of [fol. 89] the retail merchant in the State of Kentucky to increase his sales above $400,000.00.

They deny that the practical operation or effect of the alleged unequal or disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that the retail merchant who increases his sales one hundred thousand dollars above $400,000 pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are $200,000.00; or that for the next $100,000.00 increase, said merchant is required to pay an additional $250.00; or for the next $100,000 increase, an additional $400.00, or a greater tax on said one hundred thousand dol-

lars of increased sales than the entire tax of a retail merchant whose total sales are $500,000.00; or for the next $100,000 of sales, $550.00, which tax on said $100,000 of sales is as great as the total tax of a retail merchant having a total sales of $600,000.00; or for the next $100,000, the tax is $700.00; or for the next $100,000 of sales the tax is $850.00, or for the next $100,000 of sales, or for every $100,000 of sales thereafter, the tax assessed is $1,000.00, or that it is a greater tax for $100,000 of sales than the total tax required of a merchant whose total sales are $700,000.00.

They deny that under the said Act that a retail merchant having gross sales in any amount not exceeding $300,000.00, who increases his sales $100,000, is only liable to a maximum increase of taxation of $50.00, less his permitted credits, or that the plaintiff is subject to a tax of $1,000.00 on every $100,000.00 increase in sales. They deny that said classification is unjust, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph nineteen defendants deny that the classification or graduation made as a basis for the tax [fol. 90] imposed rests wholly or in part upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. They deny that said classification does not rest upon the ability of the taxpayer to pay such tax, or that it does not rest upon the income or earnings from any store or stores, or that it does not have a relation to receipts. They deny that it imposes a tax regardless as to whether said sales are made at a profit or loss, or the amount of profit or loss therefrom, or that it has no relation to profit or loss, if any is derived from said sales, or that it has no relation to capital employed or invested, or that it does not take into account the type of business. They deny that said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or the sales on credit for which payment is not received, or that it classifies sales solely as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation.

They deny that said Act taxes the dollar of sales of certain retail merchandise upon a rate and basis materially different from the dollar of sales of other merchandise by merchants engaged in direct competition or similarly circumstanced.

They deny that the rate of taxation is unreasonable, without a rational basis or that it is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph twenty defendants deny that such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any of the advantages [fol. 91] which flow from group or co-operative buying on a large scale, the pooling of merchandising power, the ability to contract for buying goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein or that said co-operative associations combine cooperatively as great a number of stores or have as great purchasing or buying power, or have as great advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that singly or individually-owned stores or members of co-operative associations are similarly situated or circumstanced, or that they are in direct competition with the plaintiff or other retail merchants owning two or more stores or are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that such competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, or that in practical operation or effect they are exempt from taxation under said Act.

They deny that such competitive stores are given undue or unfair or any economic advantages over the retail stores of the plaintiff or other merchants similarly situated or that they are in effect aided, helped or subsidized under said Act

in their competition with the plaintiff or other retail merchants similarly situated.

XXI

They deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky or elsewhere in the United States, at the present time or at [fol. 92] any time, is to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of all or any merchandise or capital; or that the retail merchant is required by reason of a small percentage of profit on single sales to have a large volume of sales or to continuously increase his sales volume in order to secure a fair turnover or return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which this plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for any merchant to meet such competition or to conform his business methods therewith, or, that in conformity therewith, the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise to the public at the lowest prices consistent with a small average profit in individual sales, or that the plaintiff or any other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair or reasonable or adequate return upon the invested capital employed in the conduct of their business, or that such merchandising methods are the basis of the business of the plaintiff or other retail merchants similarly situated, or that they are of benefit to the general public of the Commonwealth of Kentucky, or that they have brought to the plaintiff or any other retail merchants similarly situated a large or valuable good will or a large sales volume.

XXII

For answer to paragraph twenty-two defendants deny that the Act is unfair, unjust, unequal, oppressive or dis- [fol. 93] criminatory in the matter of taxation, or that it has imposed upon this plaintiff or other retail merchants simi-

larly situated, an unjust or intolerable or any burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, or that it will destroy or impair, or that the purpose of said Act is to destroy or impair, the good will or established trade or business or thereby reduce the annual gross sales made by this plaintiff or other retail merchants similarly situated, or to divert trade or custom from the retail stores of this plaintiff or other retail merchants similarly situated to the more numerous but less progressive retail merchants who have very much smaller annual gross sales. They deny that such Act in purpose or effect is in any way lacking in uniformity of application to persons or occupations taxed thereunder, or that it designedly or otherwise, transfers to or imposes upon the plaintiff or any other retail merchants similarly situated an undue proportion of license taxes attempted in said Act to be levied upon retail merchants. They deny that the Act designedly or otherwise discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid by the plaintiff or other retail merchants similarly situated who have annual gross sales in large volume, or that said Act denies to this plaintiff or other retail merchants similarly situated the equal protection of the laws guaranteed to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph twenty-three defendants deny that there is a large number of retail merchants lawfully engaged in the operation of one store, either with or with-[fol. 94] out separate departments such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff, or that each of them is subject to taxation in the higher brackets at any discriminatory or unjust rate of taxation, or that such is done to the exclusion of any number of retail merchants competing with them

respectively, who have much smaller gross annual sales or that any of such merchants are not required to pay a tax.

They deny that the retail merchants conducting stores in Kentucky, who are thus similarly situated are entirely too numerous to be joined in this suit as parties plaintiff, or that the matters and things complained of in the bill of complaint or the questions raised herein, as to the legality of the tax complained of, are all questions of common or general interest to any persons constituting a class so numerous as to make it impracticable to bring them all before the Court herein, or that this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations herein mentioned.

They deny that this plaintiff brings this suit on its own behalf and in behalf of the following:

J. Bacon & Sons,
H. P. Selman Company,
Kaufman-Straus Company,
Herman Straus & Sons Company,
John C. Lewis Company,
Hook Drug Company,
Hubbuch Bros. & Wellendroff,
Lemon & Sons,
S. H. Kress & Co.,
Great Atlantic and Pacific Tea Co.,
Montgomery, Ward & Co.

[fol. 95] XXIV

For answer to paragraph twenty-four said defendants admit all of the allegations contained in paragraph *paragraph* twenty-four of the bill of complaint.

XXV

For answer to paragraph twenty-five defendants deny that any drastic penalties will be assessed against plaintiff for nonpayment of tax, or that any penalty will be assessed against plaintiff, or any action instituted, or that any irreparable injury or damage or any injury or damage will result to plaintiff or other retail merchants similarly situated.

XXVI

For answer to paragraph twenty-six defendants deny that section 13, setting forth the emergency clause of said Act is void, or that it has no connection with or relation to the purposes for which said Act was enacted, or that said Act did not nor could not become effective prior to June 17, 1930.

They deny that neither of the purposes for which this Act was passed, namely, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and one-half for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of the State Board of Charities and Corrections, is not related to or connected with the maintenance or development of the State Government.

XXVII

For answer to paragraph twenty-seven defendants deny that said Act is void or that it violates any provisions of the Constitution of the United States or the Fourteenth [fol. 96] Amendment thereof, or that it violates any provisions of the Constitution of the State of Kentucky as herein set forth.

(1) They deny that said Act, for reasons hereinbefore set forth, is void in any particulars or respects hereinbefore pointed out.

(a) They deny that it denies to this plaintiff or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or that it is an attempt to take their property without due process of law, as an arbitrary exaction.

(b) They deny that it denies to the plaintiff or any other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or arbitrarily prohibitive rate of taxation, or that it is based upon a classification that is unreasonable, unjust or discriminatory against this plaintiff herein or other retail merchants similarly situated; or

that it taxes this plaintiff or any other retail merchants similarly situated, at geometrically increased rates, graduated according to the increased volume of gross sales, or that such graduation is without reference to any consideration or without any reasonable basis of classification, or that it imposes upon other retail merchants, doing the same kind of business in substantially the same way, a lower rate or burden of taxation, or that it wholly exempts any retail merchants under said Act.

(c) They deny that said Act abridges the privileges or immunities guaranteed to plaintiff by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of classification or uniformity are recognized by Section- 171 and 181 of the Con-
[fol. 97] stitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph twenty-eight, defendants deny that the plaintiff or other merchants similarly situated do not have an adequate remedy in the State Courts of Kentucky, or no remedy at law in the courts of the United States; or that such taxes would not be refunded if paid under protest and found to be illegally exacted.

They deny that the amount of money for the general fund on January 1, 1931, was $12,565.81, or that there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, or that such were presented for payment but not paid.

XXIX

For answer to paragraph twenty-nine of the bill of complaint, defendants admit that they will attempt to enforce the provisions of the Act referred to in accordance with its terms, but say that they have no information sufficient to form a belief as to the other allegations contained in said paragraph, and therefore neither admit nor deny same but require strict proof thereof.

XXX

For answer to paragraph thirty defendants deny that unless they are enjoined or restrained from enforcing or attempting to enforce said act the plaintiff or any other so situated, will sustain irreparable loss or injury for which it has no plain, adequate and complete remedy at law in the courts of Kentucky, or that

[fol. 98] 1. Deny that plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment, or for which they are not legally liable.

2. Deny that upon the failure of plaintiff, and others similarly situated, to pay said illegal taxes, that drastic penalties will be attempted to be enforced against plaintiff and others similarly situated, or that as a result thereof plaintiff or others similarly situated will be compelled to defend innumerable or any prosecutions brought to recover said tax and penalties or will be subject to criminal proceedings at any expense or damage to it or them.

3. Deny that defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to any irreparable injury or damage or any injury or damage to the plaintiff as a taxpayer of the Commonwealth of Kentucky.

4. Deny that if plaintiff or other- similarly situated should pay the taxes under protest and commence actions to recover as provided in Section 10, of said Act, that they would be put to a large expense for attorneys' fees and court costs, or would be required to bring a multiplicity of actions in order to recover said moneys.

5. Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States.

Deny that in consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

6. Deny that said Act is ambiguous and doubtful as to its application and meaning, or as to the procedure or require-
[fol. 99] ment thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

7. Deny that the amount of said annual tax which the plaintiff will be required to pay under the terms of said Act, will be a substantial portion, or any portion of the capital invested by plaintiff to carry on its business therein.

8. Deny that the payment of such sum of money will impair the ability of the plaintiff to operate its business in Kentucky, or will decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff any fair or undue advantage over plaintiff for which the plaintiff has no plain, adequate and complete remedy at law, or that the same is true of all other retail merchants so similarly situated.

9. Deny that the enforcement of said Act will have the effect of injuring or impa-ring any lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage which right is guaranteed and protected by the State and Federal Constitutions.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted.

For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said act, rests on the volume of gross retail sales and
[fol. 100] also upon ability of those affected by the various gradations of said act to pay the tax at the rate levied, it being a well recognized law of merchandising that the percentage of income of capital invested increases progres-

sively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —% while individual merchants competing with plaintiff and those similarly situated, having gross annual sales of less than $400,000.00, earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital, based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiff, Stewart Dry Goods Company, and others similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of [fol. 101] said tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiff, and those similarly situated, and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.
(c) As volume increases, expenses decrease.
(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed [fol. 102] for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business but are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journals relating to said bill. Such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

[fol. 103] Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 104] In United States District Court

[Title omitted]

Stipulation re Statement of Evidence

It is stipulated between the parties, plaintiff and defendants, that the attached "Statement of Evidence" correctly presents, in condensed narrative form, all material evidence offered by plaintiff upon the hearing of its (or their) motion for an interlocutory injunction, and likewise correctly presents in full the evidence offered by defendants upon the hearing of said motion—the affidavits introduced on behalf of the defendants being copied into the record verbatim, at the request of the defendants.

The filing of said "Statement of Evidence" is agreed to, and further notice and formalities are waived.

Bailey P. Woottan, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Defendants. Robert S. Marx, John C. Doolan, James W. Stiles, Frank E. Wood, Solicitors for Plaintiff.

[fol. 105] In United States District Court

[Title omitted]

Statement of Evidence

Affidavit of Robert J. McKim

He is 35 years of age, and President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewart's), a corporation organized under the laws of the State of Kentucky, with its principal office and place of business in Louisville. Has been president of Stewart's since March 10, 1930, and prior to assuming that position has been in the retail dry goods and department store business for sixteen years. Before entering this business was a student at Tulane University. By virtue of his position and experience in the dry goods and department store business, he is familiar with the methods customarily employed in conducting said business, and with the general retail situation in Louisville.

By virtue of said fact and by making comparison with the sales of his own store, of which he, as president, has personal knowledge, he is qualified to estimate the approximate gross retail sales in other stores in Louisville.

He is familiar with the location and type of all of the [fol. 106] larger retail stores in Louisville, and has had an opportunity and has observed the nature, extent and character of their business. He is likewise acquainted with many of the smaller establishments, and has made a survey of the city and consulted with various department managers, buyers and executive officers of Stewart's with a view to fortifying his information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewart's, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewart's. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as to determine whether or not a particular department is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewarts handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.00.

[fol. 107] 3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which he has made, as mentioned above, he has made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with his personal knowledge and the knowledge of the various department managers with whom he has consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which

Stewarts makes of its departments. Therefore, he has carefully examined the classifications made by the City Directory and in every instance reasonably possible, he has listed all of the stores competing with Stewarts. This results in a classification of about ten different kinds of [fol. 108] competition, thereby furnishing as accurate an analysis of the general retail situation as he knows how to make.

In the lists following he has in general omitted other department stores unless for particular illustration where he has noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that he knows of:

(Affiant here lists eight stores by name and address.)

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of The Stewart Dry Goods Company would be $465.70 on sales made in those departments approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in [fol. 109] Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-four specialized stores:

(Affiant here lists fifty-four stores by name and address.)

In his opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company.....425 South Fourth Street
Levy Brothers.....Market—Cor. Third Street
Lovenhart & Co.....Cor. Third and Market
Rodes Rapier Co.....Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boys' clothing and boys' furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon [fol. 110] the dollar of sales of each of the above fifty-four stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments of Stewarts.

C. Clothing Dealers—Women's and Misses—Retail

Under this heading the directory lists thirty-one stores to which he has added from other sources of information sixteen additional stores with the result that the following list is, in his opinion, complete:

(Affiant here lists forty-seven stores by name and address.)

Of these stores more than one-half of them are located in the downtown shopping district where the competition

for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00:

Du Rand Perry Co.	538 So. Fourth Street.
Besten-Langen Company	518 So. Fourth Street.
Byck Bros. Co.	532 So. Fourth Street.
Mangels, Inc.	528 So. Fourth Street.
H. P. Selman Co.	4th St., at Walnut.

There is no essential difference between the methods of doing business of the above stores located in the downtown [fol. 111] shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which he has added eight others, making the following complete list:

(Affiant here lists twelve stores by name and address.)

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

E. Dry Goods—Retail

The Directory Lists 152 stores other than department stores which handle dry goods.

The following department stores have, in his opinion (in all departments, including dry goods) sales in excess of $400,000.00:

[fol. 112] J. Bacon & Sons. . . . 334 West Market Street.
Jefferson Dry Goods Company . Fourth & Jefferson Streets.
Kaufman-Straus Company . . . 427 South Fourth Street.
John C. Lewis Company . . . . . 450 South Fourth Street.
Sears-Roebuck Company . . . . 820 West Broadway.
W. T. Grant & Company . . . . . 424 South Fourth Street.
Ben Snyder Department Store 522 West Market Street.
Herman Straus & Sons . . . . . Fourth & Market Streets.

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in his opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

(Affiant here lists one hundred and fifty-two stores by name and address.)

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition.

However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

F. Fur Dealers and Furriers

The following list includes to the best of his knowledge all of the stores in the City of Louisville other than [fol. 113] Stewarts, handling furs. Due to the small number involved he has included department stores in this list with the specialized stores:

(Affiant here lists twenty stores by name and address.)

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in his opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated feature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have [fol. 114] been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

(Affiant here lists fifty-six stores by name and address.)

Of the above, the sales of the following six stores exceed $400,000.00:

Bensinger Outfitting Co	315 W. Market Street
Central Furniture Co	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West. Furn. Co.	720 W. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the above fifty-

six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be [fol. 115] $950.00 less deductions. Compared with this the tax on the furniture department at Stewarts would be $1,097.96 after deductions on approximately ⅕th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here he has lumped together the stores listed under the following headings in the directory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In his opinion the following list includes all of the recognized music stores in the city:

(Affiant here lists fifty-nine stores by name and address.)

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed $150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in his opinion complete:

(Affiant here lists thirty-eight stores by name and address.)

[fol. 116] Two stores located on Fourth Street which, he is advised, are owned by the same merchant have together

probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which he has listed are in the downtown shopping district where they are in continuous active competition with the millinery department of Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

(Affiant here lists sixty-six stores by name and address.)

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. [fol. 117] Compared with this the tax after deduction/ of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that he knows how to make from the sources of information available to him.

Various specific instances as to other department- occur to him, demonstrating the discrimination against Stewart's, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods

and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon his estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1/5th in amount of those made by said company.

[fol. 118] Again, Stewarts china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years, conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales in every instance that he knows of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps, do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

[fol. 119] Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from outside the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewarts' sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

[fol. 120] In nearly all of the cases which he has mentioned the specialized stores competing with one or more of Stewarts departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order houses located in other States who secure by mail and catalogue, orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and make sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Ken-

tucky, it is apparent that their competition is felt only in cities large enough to attract their exhibitions. It is only in the larger cities that there are stores of sufficient size [fol. 121] to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which he has made are equally applicable for other years than 1930, and to other lines of trade than those which he has expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. He knows of no reasonable basis upon which the classification made by the 1930 Sales Tax Law can be justified.

Robert J. McKim.

(Duly Verified.)

AFFIDAVIT OF FRED LEVY

He is senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western District of Kentucky, at Louisville, being No. 610 on the equity docket.

He is 53 years of age, and all his life has been in touch with the business of Levy Bros., founded by his father and his father's brothers about 70 years ago and from the beginning conducted in one store at the same location, hav- [fol. 122] ing been connected with this firm for over 36 years. After the death of his father and his brothers, he became the senior member of the firm, and in that capacity he has had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling, display of goods, advertising and the many other questions of vital importance that determine the success or failure of a retail store, and especially of a store like that of Levy Bros., handling lines of merchandise

in which the taste of the buying public must be trained as well as indulged.

He knows the recurring problems of ever-changing conditions and keen competition constantly facing retail merchants in such a business as that of Levy Bros. He knows the value of a good name and a good business reputation in developing and preserving the goodwill of a business. His firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, he knows that, year by year, they have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of [fol. 123] such size that he can handle it at small expense by himself o*f* members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted in 1930—at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the

1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of [fol. 124] complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of compensation with Levy Bros. Richman Bros. Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut Streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent., when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such dis- [fol. 125] crimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual mer-

chants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros.

Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discrimination against Levy Bros. effected by the 1930 Gross Sales Tax Law.

[fol. 126] Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and in the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louisville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that [fol. 127] of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

(2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

(3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that the affiant has no personal knowledge as to the [fol. 128] gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

(Duly Verified.)

AFFIDAVIT OF DANN BYCK

He is President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is, the owners do not own or control

any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect [fol. 129] each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in Byck's store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as these [fol. 130] competitors must bear a much heavier burden.

He has spent the last 10 years in the employ of Byck Bros. & Co. and he is familiar with the general rules governing the operation of stores carrying on this type of business. In Byck's case, they operate on the basis of a small margin of profit. This is one of the outstanding features of efficient merchandising. Byck's records show that they make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store

of this type. It can be readily seen that the Kentucky Gross Sales Tax takes a large percentage of this profit.

This store was established 30 years ago by affiant's father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Its growth is due to the adoption of efficient merchandizing methods and it would be discarding these methods if it attempted to secure a larger profit than it is making. It will have to content itself, therefore, with the 1% profit it is making. If it increases its sales the per cent of profit to sale will not increase but the tax would. For example, assume that through intense effort and application it is able in 1930 to increase its business an additional one hundred thousand dollars, on which it would earn, figuring on a 1% basis, a net profit of [fol. 131] $1,000. Under the confiscatory terms of this tax, $700 of this $1,000 profit would be taken. If, in the course of another year, it gains another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if it is able to reach its goal of $1,000,000 by adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that the sales of this department should be added either to the sales of all other departments in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by Byck's in Louisville. [fol. 132] He is not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of the Louisville store but he is certain that the sales will not be

taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and Byck's will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to the sales in Louisville then it increases Byck's sales and places it in a bracket where its tax approaches 1% and as a result this department would be subjected to a higher tax merely because Byck's operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies' shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon Byck's and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell it in their particular line and take away its business without subjecting themselves to the tax. It must be borne in mind that these persons have the same [fol. 133] buying facilities that Byck's has. About 95% of them belong to buying organizations and they purchase for their store as much or more than Byck's buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of Byck's department. If Byck should increase the sales of this particular department or any department the increased sales would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell Byck's because of the fact that Byck's had to pay a heavy tax not imposed on him. He could, therefore, take away all this business and increase his sales to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if Byck would make them and only 1/20 of 1% if its competitor would make them.

Dann C. Byck.

(Duly Verified.)

AFFIDAVIT OF C. B. TURLEY

He is President of the Kaufman-Straus Company, Incorporated, hereinafter called "Kaufmans", which operates a Department Store in the City of Louisville. It sells Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Depart- [fol. 134] ments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department of this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the maximum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, [fol. 135] and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, Kaufmans Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels Kaufmans to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing it into the higher bracket.

Another example is the Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are owned by corporations which do not own or operate any other Department in this store. He is informed and believes that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments [fol. 136] operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing it in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the leased departments would be added to Kaufman's sales, its tax would be increased by the outside sales. Under either construction, the addition of sales in unrelated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell Kaufmans and deprive it of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Depart-

ment Store operates ten Departments, each of which has [fol. 137] sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all Kaufmans business is taxable at a high rate, its competitors could take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

(Duly Verified.)

Affidavit of Arch B. Davis

He is vice-president of the Citizens-Union National Bank in Louisville, Kentucky. Has held that position for approximately fifteen years.

By virtue of his position he has bought, sold and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. He [fol. 138] believes that he has handled as large a number of Warrants through the Citizens-Union National Bank as any individual in the State.

His experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing, and he estimates that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which

would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

Amount of warrants outstanding against the General Fund	$9,880,502.76
Amount in General Fund available to pay off same	12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

(Duly Verified.)

[fol. 139] AFFIDAVIT OF G. H. PARKER

He is the manager and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one

department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

(Duly Verified.)

[fol. 140] NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS, GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

[Title omitted]

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributors' Association, the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributor's Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

"To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

[fol. 141] 1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next $100,000 of sales.
8/20 of 1% on the next $100,000 of sales.
11/20 of 1% on the next $100,000 of sales.
14/20 of 1% on the next $100,000 of sales.
17/20 of 1% on the next $100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State Legislature has a perfect right to instigage any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

[fol. 142] In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe $2.00 in order that the Association may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% Sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers' interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoy a volume of less than $60,000 and that for that reason 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic [fol. 143] & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars' worth of sales; that there is a breakdown at $249,999 and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to made certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that [fol. 144] they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to test the law; that he mailed out a bulletin on December 27, 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

"To Grocery Manufacturers and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed 'the 1930 retail sales tax law.'

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

[fol. 145] While our state law makers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents — were engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. It this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional, but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

and that he sent out bulletin dated December 9, 1930, to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3 and reads as follows:

[fol. 146] December 9, 1930.

"To the wholesale trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know,

is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1% tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing The Kentucky Food Distributors Association to employ legal counsel, and pro rata the cost among wholesale and retail grocers.

An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must be final on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up your financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

We must get our money together not later than December 20. Please mail your check for ten dollars at once, and

get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would [fol. 147] be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4, and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all sales made by them at retail. The instructions seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quantities and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to the [fol. 148] Gross Sales Law.

[fol. 149] AFFIDAVIT OF JAMES R. KARIBO

He is manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street, in Louisville, Kentucky. Has held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the fac simile signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has [fol. 150] repeatedly seen it upon the licenses issued to registered pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

(Duly verified.)

EXHIBIT 1 TO AFFIDAVIT OF JAMES R. KARIBO

(Kentucky Pharmaceutical Association)

January 16, 1931.

To the druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it

will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

[fol. 151] The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If your sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20

of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect [fol. 152] right to instigate any legislation to take care of the state government expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe [fol. 153] $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the

maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independent interests. Your share in this is $2.00. Send [fol. 154] it now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later.

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

(Envelope)

After 5 days return to J. W. Gayle, Secretary Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.

Liggetts Drug Store, 302 S. 4th Str., Louisville, Ky.

AFFIDAVIT OF N. A. BASH

He is District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. Has held his position since Septemper, 1927.

[fol. 155] The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain

drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it.

He is a registered pharmacist in Kentucky, and by virtue of such registration he is, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

He has read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Walgreen's, Liggett's, Dow's, and Whelan's, the latter being known locally as Taylor Drug Company Stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand and the so-called "in-[fol. 156] dependent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have attempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members, the circular

letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

(Duly verified.)

[fol. 157] AFFIDAVIT OF H. C. AMSTUTZ

H. C. Amstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, Underwear, and Lingerie.

D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-Wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

[fol. 158] K. Women's Millinery, Men's Hats and caps,

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lawenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

Name and type of store	Estimated sales in excess of
None	$1,000,000
None	900,000
None	800,000
None	700,000
None	600,000
None	500,000
None	400,000

Approximate number below 400,000 as shown by directory.

4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

[fol. 159] Rotary Club.

Member of Local Masonic Lodge.

Manager and Wife member of Local Eastern Star.

Entire family liberal contributing members of local church.

Red Cross.

Member of Municipal Golf Club.

Member of Y. M. C. A. (just recently closed).

Retail Merchants Association.

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set opposite to their names:

Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boys Scout	25.00
Christian Record Publishing Co.	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50
Cousin Molly Milk Fund	5.00
Retail Merchants Assn. (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave Natl. Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of [fol. 160] the J. C. Penney Company in a local bank of Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Company head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what de-

partments he can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount to [fol. 161] approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are operated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competi-

tive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily believes.

H. C. Amstutz.

(Duly Verified.)

[fol. 162] STATEMENT RE SIMILAR AFFIDAVITS

Similar affidavits to that of H. C. Amstutz were filed by the following managers of the J. C. Penney Company stores in Kentucky covering the same facts in their application to their particular communities:

Cities of the Second Class:

L. M. Ross	Lexington, Ky.

Cities of the Third Class:

C. R. Leininger	Bowling Green, Ky.
E. R. Probasco	Corbin, Ky.
B. E. VanAntwerp	Frankfort, Ky.
W. G. Howell	Henderson, Ky.
E. C. Purvis	Hopkinsville, Ky.
M. S. Gesley	Maysville, Ky.
A. C. Miller	Middlesboro, Ky.
O. A. Rhodes	Owensboro, Ky.

Cities of the Fourth Class:

W. T. Morgan	Central City, Ky.
W. G. Jenkins	Georgetown, Ky.
Robert Wright	Madisonville, Ky.
H. H. Craven	Mayfield, Ky.
T. B. Jones	Mt. Sterling, Ky.
P. O. Wolverson	Paris, Ky.
C. W. Gowin	Princeton, Ky.
B. E. Willis	Richmond, Ky.
J. D. Delano	Winchester, Ky.

Cities of the Fifth Class:

J. A. Gude	Glasgow, Ky.
B. A. Aistrop	Lancaster, Ky.

The testimony of the foregoing 20 witnesses is in all essential respects identical with the testimony of H. C. Amstutz, and the effect thereof is simply cumulative—hence these affidavits are omitted for the sake of brevity.

[fol. 163] AFFIDAVIT OF DOLPH WILE

He is the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. He has been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, he is familiar with the general retail situation in the City of Lexington, Kentucky. He is familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years he has had an opportunity to observe the amount and character of their business. Basing his opinion upon these various factors and his own experiences and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Lexington, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

(Affiant here lists seven stores by name and address.)

[fol. 164] Basing his opinion as aforesaid, he estimates that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner

in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

(Duly Verified.)

Affidavit of C. H. Parsons

He is the President and chief officer of the Parsons-Faulkner Company of Ashland, Kentucky. The Parsons-Faulkner Company operates the largest retail department store in Ashland. He has been in the department store business for eleven years and was one of the organizers of The Parsons-Faulkner Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, of Ashland, Kentucky, he is familiar with the location, management and type of the various other stores in Ashland, and over a period of a great many years he has had an opportunity to observe the amount and character of [fol. 165] their business, basing his opinion upon these various factors and his own experience and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Ashland, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion his is the only store in the City of Ashland, having annual sales in excess of $400,000.00; his sales amounting to approximately $450,000.00.

Basing his opinion as aforesaid, he estimates that there are approximately 300 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out herein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Ashland in the same manner in which he has demonstrated their application to the City of Louisville.

C. H. Parsons.

(Duly Verified.)

[fol. 166] AFFIDAVIT OF MILTON MARX

He is a member of the partnership of Louis Marx and Brothers. They conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and he has had charge of the Newport store for the last forty years. Because of his experience in business in the city of Newport he is familiar with the general retail situation in that city. He is acquainted with the location and type of all the larger retail stores in Newport, and he has had an opportunity to, and has observed the nature, extent and character of their businesses.

In his opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000.00, but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In his opinion the number of such merchants does not exceed five.

Milton Marx.

(Duly Verified.)

AFFIDAVIT OF ROBERT W. LYONS

He is executive vice president of the National Chain Store Association, and has had extensive experience as a lawyer, economist and financier, qualifying him as expert [fol. 167] to testify as to the facts set out in his affidavit.

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approxi-

mately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no cooperation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, [fol. 168] and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cities, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the signifigant facts of retail trade in an area embracing roughly, 10% of the retail sales of the United States. This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information, it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the

[fol. 169] single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.
2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.
3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.
4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.
5. The relations of employees to consumers must be carefully studied and developed.
6. Good management must be present.
7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established [fol. 170] realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differen-

tiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption available and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent an additional saving in price and in freight.

[fol. 171] Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatis-

[fol. 172] factory merchandise and the fact that such merchandise represents a substantial volume which is neces-

sarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66⅔% of all the net earnings of stores falling within the above averages.

Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and [fol. 173] the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various nonresident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionately accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or

perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

The best available figures indicates that the average operating expense in retail grocery enterprise is about 18% [fol. 174] of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientilc management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-

called "voluntary chains" of independent retailers, compris-
[fol. 175] ing more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store." Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailer in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that of the regular "chain store," thus saving him sub-
[fol. 176] stantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make

payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating [fol. 177] companies have often operated a new store successfully for a year or two years in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it unprofitable for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more intimate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual or so-called "independent mer- [fol. 178] chant." The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the

recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" development upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent
1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23 per cent

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no [fol. 179] "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent
1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25% per annum. The average by year mortality figures for this period [fol. 180] are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger

or more successful organization absorbs it rather than to allow it to liquidate in bankruptcy, just as it happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

A. A. Adams Stores.
National Drug Company.
Schulte United.
Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

[fol. 181] Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax, representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the State of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

(Duly verified.)

AFFIDAVIT OF JOHN B. BONHAM

He is vice president of the Kroger Grocery and Baking Company, and is familiar with practically every phase of

the grocery, meat and vegetable business as well as with the general economics of retail trade.

(This witness's testimony is principally concerned with the situation in regard to chain grocery stores, and is therefore largely omitted in this narrative.)

[fol. 182] His experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, rents, taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, Kroger has a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of mere sales volume to net earnings or profits, is further illustrated by the fact that a number of stores [fol. 183] which which Kroger is in competition and which have a smaller sales volume than Kroger's stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build his business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive stores which cater more

particularly to the average consumer, who does not require special service or luxury items. He has observed that the same thing is true of other businesses with which he has had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

John B. Bonham.

(Duly verified.)

Affidavit of W. A. Steiden

He is 43 years old, and has been engaged in the grocery business ever since he started to work. He was general manager of the Piggly Wiggily Valley Company beginning in 1917, and for the past two years has been branch manager for the Louisville branch of the Kroger Grocery and Baking Company.

The witness has extensive duties in checking the sales and [fol. 184] inspecting the two hundred and twenty-two stores under his management, and as a part of his duties he endeavors to keep advised as to competing stores.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

The grocery business in the city of Louisville and in the state of Kentucky is highly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations

who operate a single store. The Kroger store, situated at 2549 W. Market St., handles soft drinks, cigarettes, and oleomargarine. It pays a $6.00 license fee for the right to [fol. 185] sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th & Griffith Ave., is in direct competition with this Kroger store. I estimate its annual sales at $50,000.00 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's grocery sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars worth of sales in Kentucky, the tax on each store would be about $450.00, and when the deduction is taken off there would still remain a tax of about $425.00.

The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

The profits which Kroger endeavors to make from store [fol. 186] op-ation in the Branch over which he has supervision do not average over 1½ to 2% on gross sales, but it is not able to make this profit at all times and a number of stores in his district have been operated at a loss for the last two years. The tax, therefore, would take about one-half Kroger's profit and would frequently turn its profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppres-ive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax

has wiped out any margin of profit which it might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or else they could undersell Kroger without paying any tax on the business which they take away from Kroger. Many of the stores which Kroger operates are under long term leases, and the closing of these stores would involve heavy losses.

Many of the competitive stores, although individually owned, are now members of a co-operative association.

W. A. Steiden.

(Duly Verified.)

[fol. 187] AFFIDAVIT OF D. T. PETTY

He is 31 years of age, and lives in Evansville, Indiana. For the last six years has had charge of District 14 of the Louisville Branch of the Kroger Grocery and Baking Company. His district in Kentucky is comprised of the counties of Davies, Hopkins, Henderson and Christian. The witness sets out the particular competition in the chain grocery store business within his district.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales Tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the set-offs which they are allowed to take. It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who [fol. 188] operate or own a single store, could open new stores without subjecting themselves to the tax.

He believes that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of the co-operative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who co-operate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as affiant assists the Kroger managers.

Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger stores as separate units but aggregate the sales of all of its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the benefits received by [fol. 189] voluntary association of independent store owners and permits these owners to operate without paying any tax.

D. T. Petty.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF GILBERT J. SNYDER

The testimony of this witness is concerned with the chain grocery store business exclusively, and for that reason is omitted herefrom.

STATEMENT RE AFFIDAVIT OF ALBERT B. BERGER

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted.

He is 30 years old and lives in Lexington, Kentucky. He has been in the grocery business for nine years, and is superintendent for the Great Atlantic & Pacific Tea Company, has charge of 49 stores in the eastern part of Kentucky.

The average gross sales of each Atlantic & Pacific store in his territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under his supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductible, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay be- [fol. 190] cause their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell oleomargine, cigarettes and candled eggs. The tax on the independent store would be 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomargine license would completely offset this tax. The Great Atlantic & Pacific Tea Co. has sales approximating Thirteen Million ($13,000,000) dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of the Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which mem-

bers of the Atlantic & Pacific organization have—no tax to pay.

[fol. 191] The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quantity buying and supervision by a trained expert; however, the owner of this store sells oleomargarine and cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under his supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business [fol. 192] would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell him without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which he supervises are held under long term leases and the closing of the same would involve heavy losses.

He is informed and believes that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) Per Cent on sales; that is, if they were taxed in the same manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the co-operative association, although enjoying all the

benefits enjoyed by the Atlantic & Pacific stores under his supervision, pay no tax at all.

Groceries which are in the immediate vicinity of the Atlantic & Pacific store which he operates have no taxes to pay, while his stores have a heavy burden to meet, although these stores are direct competitors.

Each store in the Atlantic & Pacific system is a separate [fol. 193] unit, separate books are kept and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the goods it sells. The Aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax statute, disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Grocers Alliance.

John E. Donahue.

(Duly verified.)

Statement re Affidavit of John Scanlan

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted herefrom.

Affidavit of Chris Schulmann

He is 40 years old, and lives in Louisville, Kentucky, and has been in the grocery business for sixteen years. He is superintendent in charge of 62 stores in the Western section of Louisville for the Great Atlantic and Pacific Tea Company.

The fact that an organization operates a store or a group of stores in another city has no effect on the stores which he supervises in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of the stores under his supervision is in direct competition with other stores which are carrying on the same kind of business as that conducted in any one of the A & P stores. The com- [fol. 194] petitors sell the same merchandise and they have

the same method of business—the only difference is that in his case he supervises a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which he supervises that are doing more than $100,000.00 worth of business a year.

Almost every grocery store in his district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. Competitors of the stores under his control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same special taxes. For example, in the city of Campbellsville, he supervises a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to [fol. 195] pay are deductible from the tax he has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores. The same result would occur in the case of every A. & P. store under his supervision, i. e., each store would be subject to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at No. 4 Kings Block; this store is under his direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and

eggs. The total special license tax which the store he supervises has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which he supervises; the business conducted is exactly the same as the business conducted in the A. & P. Store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which he supervises, and not on the competitor of that store.

In Louisville, he supervises the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd and Portland Avenue. Mr. Fischer has no other store and the [fol. 196] store operated by him is one of the chief competitors of the one which affiant supervises. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which affiant has listed above are fair examples of the situation in regard to each one of the sixty-two stores which he supervises. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which he supervises. In some cases the competing stores have a larger volume of sales than the stores under his control, but, in each case, the competing stores are owned by either a corporation or an individual that owns no other stores, and pays no tax, whereas each and every one under his supervision pays a large tax under the Gross Sales Statutes. This is caused by the fact that the sales in every one of the A. & P. stores are added together in order to put A. & P. into a higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute would be those who operate enough stores so as to make their aggregate sales over $400,000.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect [fol. 197] of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under affiant's supervision. Such a tax would force the company to close almost all, if not all, its stores which he controls,

at least he is practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in his territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which he supervises were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which he supervises to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for competitors to undersell him, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of [fol. 198] 1%, which Hawkins could do because of the heavy tax imposed on the A. & P., he would be able to get the entire A. & P. business in Elizabethtown; he would then have sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store he operates has one or more nearby competitors who would be glad to secure the business done by his stores. The stores which he supervises attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many competitors have copied A. & P.'s attempt to supply the customer on the basis of a small margin of profit although they own only one store. Many of the competitors of the stores which he supervises are members of co-operative buying associations. These organizations purchase goods for all members of the co-operative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as he supervises the stores under his

control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, [fol. 199] under *under* the Kentucky Sales Tax Law, the members of the co-operatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in his stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF LOUIE J. JONES

He is 31 years old, and lives in Louisville, Kentucky. As superintendent for the A. & P. stores he has charge of 65 stores situated in the east end of the city of Louisville. His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative it is omitted.

Louie J. Jones.

(Duly verified.)

[fol. 200] STATEMENT RE AFFIDAVIT OF BRACK M. FERRILL

He is 36 years of age and lives in Evansville, Indiana. He is superintendent for the Great Atlantic & Pacific Tea Company, in charge of 66 stores, of which 18 are situated in Kentucky.

His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative, it is omitted.

Brack M. Ferrill.

(Duly verified.)

AFFIDAVIT OF M. R. ANDERSON

He is Safety Director of the city of Lexington, and in his opinion the operation of a group of stores by a retail merchant does not increase the fire or police hazard except in an arithmetical ratio.

M. R. Anderson.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF HARMON NOE

He is Chief of Police of the City of Harlan, and testifies to the same effect as M. R. Anderson.

Harmon Noe.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF R. W. OWENS

He is Chief of the Hazard Fire Department, and testifies to the same effect as M. R. Anderson.

R. W. Owens.

(Duly verified.)

[fol. 201] STATEMENT RE AFFIDAVIT OF CRAWFORD LEE

He is Chief of Police of the city of Harlan, and testifies to the same effect as M. R. Anderson.

Crawford Lee.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF JAMES W. STITES

This witness simply testified in regard to matters contained in the senate and house journals relative to the passage of House Bill No. 111. As this matter is set out in

a certified copy of the entries in the journals filed by the Defendants at the trial of this case, this affidavit is omitted.

James W. Stites.

(Duly verified.)

Affidavit of Daniel M. Cohen

He is a director of the Dan Cohen Shoe Company, and has charge of the store operated by said company in Covington, Kentucky. He is familiar with the general retail situation in that city.

In his opinion there are only three stores in the city of Covington which have sales over four hundred thousand dollars in their Covington stores.

Daniel M. Cohen.

(Duly verified.)

Affidavit of Paul H. Nystrom

He is 53 years of age, and is professor of marketing in the School of Business of Columbia University. He quali- [fol. 202] fies himself as an expert upon retail marketing, and particularly in regard to chain store operations.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales

per year in grocery stores and somewhat more than that in drug stores and hardware stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses [fol. 203] of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware [fol. 204] dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with the

costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering the goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced, by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

[fol. 205] Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services, the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller, independent retailers are uniting in large numbers for the purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement

[fol. 206] by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these [fol. 207] new lines of trade earned and are entitled to their growth and success.

High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Cer-

fainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in importance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent [fol. 208] retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated:

"After an extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by the affiant and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

[fol. 209] With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store developement and would cer-

tainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present development of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is the attractions of the larger cities that have caused the trade in smaller towns to decline. These chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities splendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of [fol. 210] them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignifigant businesses and, while the volume of business done is, of course not a direct measure of the importance of the retailer in his community it may be safely taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less than $5,000 or even less than $10,000 a year, there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by

a constant stream of new beginnners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these con- [fol. 211] ditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious excuse for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away, he has no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element [fol. 212] in this list in which independents cannot by the application of intelligence and energy do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of the purchase of goods he can do as well as the chains. There has been a very rapid de-

velopment in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such co-operative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store systems. Indeed with buying power equalized a great many independent retailers are able, through the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers [fol. 213] have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and large, where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain stores and the net result of this competition has been and is now enormously advantageous to the consuming public.

[fol. 214] Chain store organizations are often criticized for their lack of interest in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores that they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does not have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and independent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

The Kentucky Gross Sales Tax Law provides for the assessment of a graduate tax against gross sales rather than [fol. 215] net sales. Gross sales constitute an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns and allowances. They run considerably higher in clothing, furniture, floor covering, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases

still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000.00 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be [fol. 216] questioned. If the tax be added to the expenses of operating and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual [fol. 217] transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the tax. Less than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and specialty stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dis-[fol. 218] pose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also the *the* progressive development of the state of Kentucky.

Paul H. Nystrom.

(Duly verified.)

[fol. 219] LETTER OF JOSEPH MARTIN AND A. H. BRENDEL CERTIFYING GROSS SALES TAX REPORT ANALYSIS AND THE ANALYSIS

February 13, 1931.

Hon. J. W. Cammack, Attorney General Commonwealth of Kentucky, Frankfort, Kentucky; Hon. Frank E. Wood, 900 Traction Building, Cincinnati, Ohio.

GENTLEMEN: As per your request of February 9th, we are attaching hereto a report showing the number of Gross Sales Tax Reports filed with the Gross Sales Tax Department of the Commonwealth of Kentucky, and an analysis of same up to and including February 12, 1931.

These statements were compiled under the supervision of Mr. Joseph Martin, Supervisor of the Gross Sales Tax Department, and Mr. A. H. Brendel of the firm of J. D. Cloud & Co., Certified Public Accountants, and we hereby certify that the attached statements are true and correct to the best of our knowledge and belief.

Respectfully submitted.

Joseph Martin, Supervisor Gross-sales Tax Department. A. H. Brendel, Certified Public Accountant.

[fol. 220] Number of Blanks Sent Out (Estimated by Mr. Martin) 55,000

Number of Reports Filed by Retail Merchants

	Number filed	Number indicating tax	Number indicating no tax
Showing retail sales less than $400,000	16,353	11,025	5,328
Showing retail sales between $400,000 and $500,000	9	6	3
Showing retail sales between 500,000 and 600,000	4	2	2
Showing retail sales between 600,000 and 700,000	4	3	1
Showing retail sales between 700,000 and 800,000	2	1	1
Showing retail sales between 800,000 and 900,000	1	.....	1
Showing retail sales between 900,000 and $1,000,000	.....	.....	.....
Showing retail sales in excess of $1,000,000	1	.....	1
Totals	16,374	11,037	5,337
Number of reports returned showing retail merchants out of business or not engaged in retail trade (Estimated by Mr. Martin)	1,060		
Total reports received	17,434		

Number of Reports Showing Tax Liability

	No. of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing sales less than $400,000	16,353	$247,923,309	$121,741.66	$59,645.00	$62,096.66	$171,795.54
Showing sales between $400,000 and $500,000	9	4,034,504	2,422.40	1,303.71	1,118.69	6,233.71
Showing sales between 500,000 and 600,000	4	2,247,599	1,817.99	1,452.93	365.06	5,283.65
Showing sales between 600,000 and 700,000	4	2,585,035	2,518.57	1,108.12	1,410.45	177.20
Showing sales between 700,000 and 800,000	2	1,485,783	1,642.86	977.52	665.34	1.49
Showing sales between 800,000 and 900,000	1	814,559	636.15	636.15	.....	1,755.24
Showing sales between 900,000 and 1,000,000	.....	.....	.....	.....	.....	.....
Showing sales in excess of $1,000,000	1	1,325,934	6,309.35	6,309.35	.....	4,593.15
Totals	16,374	$260,416,723	$137,088.98	$71,432.78	$65,656.20	$189,839.98

Number of merchants outside of First and Second Class Cities reporting over $400,000 sales.....Two.

	Number of Merchants Reporting Sales of	
	Showing tax liability	Showing no tax liability
Less than $10,000	4,897	3,666
$10,000 and under $25,000	3,668	1,108
$25,000 and under 50,000	1,521	353
$50,000 and under 75,000	455	111
$75,000 and under 100,000	187	33
$100,000 and under 150,000	152	28
$150,000 and under 200,000	61	12
$200,000 and under 250,000	34	9
$250,000 and under 300,000	22	3
$300,000 and under 400,000	28	5
Over $400,000	12	9
Total	11,037	5,337

[fol. 221] **Testimony for Defendants**

[fol. 222] NARRATIVE OF TESTIMONY OF WALTER BURR, GIVEN BEFORE ALMA RHEAD, FEBRUARY 7, 1931

WALTER BURR testified as follows:

That he has been Professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change [fol. 223] is found in the introduction of store distributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have borne to a considerable extent the responsibility of the conservation and developments of com-

munity resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where heretofore they were on an apprenticeship basis and are now [fol. 224] being introduced in high schools under support of federal funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in in-

creasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy [fol. 225] are not actually increasing but that the number of reported cases is larger due to increase in registration.

Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of cooperative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owners of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That chain store systems have extended their operation very rapidly in the last few years but that The Great Atlantic & Pa-

cific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed [fol. 226] production" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one or two stores.

[fol. 227] That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and

that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these cooperative stores is open to every individual grocery store. That members of the cooperative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain civic functions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owners as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some [fol. 228] individual merchants support the public schools and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study

and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of commitments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that a member of rural community purchases, including all necessities of life, is distributed through multiple outlet stores.

[fol. 229] That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchases would amount to $540.00 per year and assuming that efficiency results in a ten percent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five percent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redict examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the

individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either The Great [fols. 230-232] Atlantic & Pacific Tea Company or The Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do business. That the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testified but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

[fol. 233] AFFIDAVIT OF HENRY F. WALRADT

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

HENRY F. WALRADT, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, setting in practically all of the taxation committees of the Sessions of the General Assembly. I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a mem-
[fol. 234] ber of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identification, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State

[fol. 235] of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%
Express companies	2%
Telegraph	2%
Electric light and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the [fol. 236] contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of rail-

roads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

[fol. 237]

	Tax
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the *absolute* amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern

receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed [fol. 238] that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the *amount* of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that [fol. 239] in addition to the general property tax some other form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the

case of both taxes the rates increase as the amount of the base—*i. e.*, gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table [fol. 240] has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than 82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky [fol. 241] Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective [fol. 242] rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of

gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due [fol. 243] under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and resulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the conclusion that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

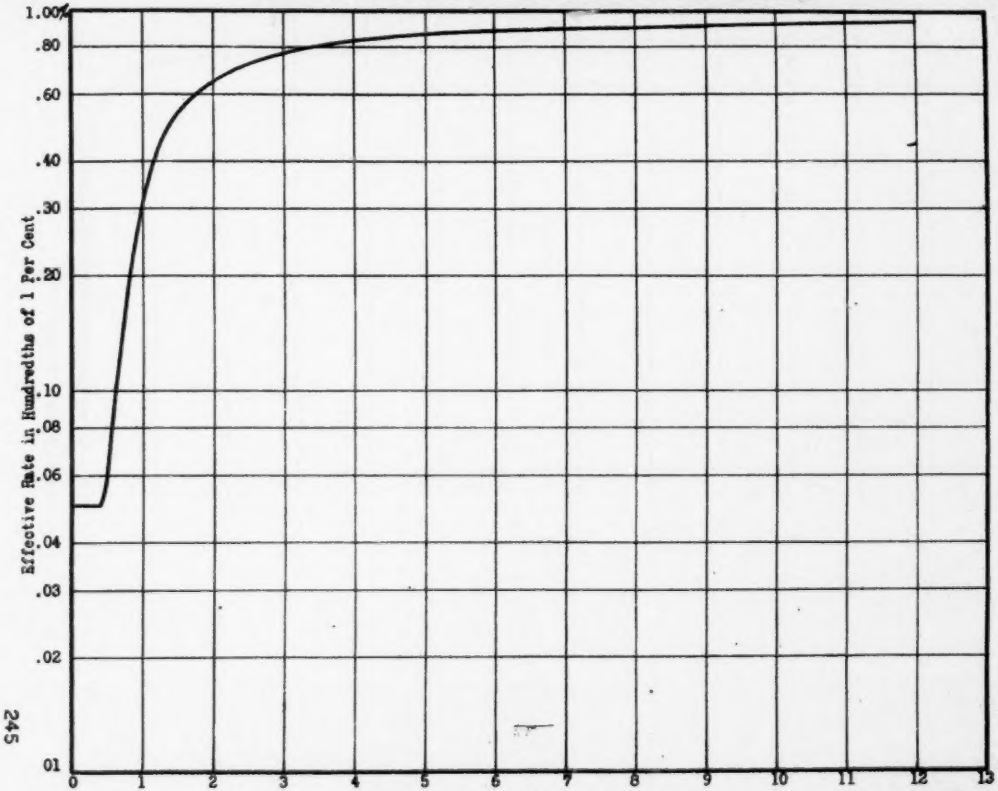
Henry F. Walradt.

(Duly verified.)

[fol. 244] (Here follow Exhibits A and B to affidavit of Henry F. Walradt, side folios 245 and 246.)

EXHIBIT "A" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



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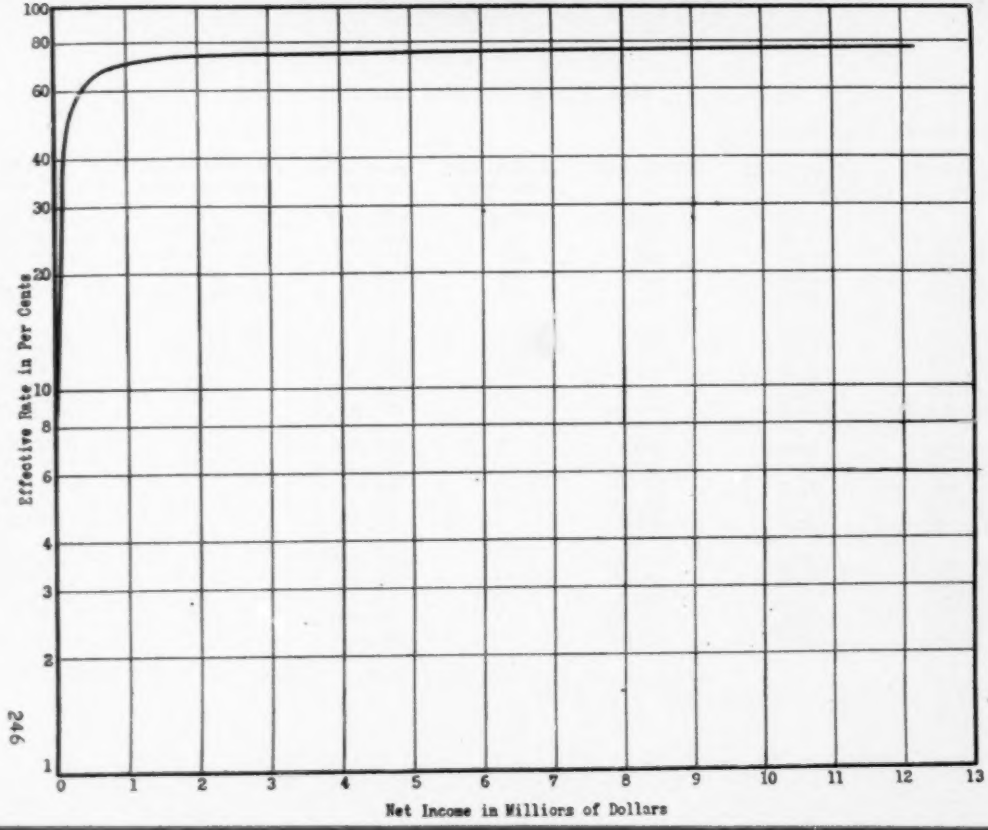
EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



[fol. 247]

[fol. 248]

Appendix

Exhibit C to Affidavit of Henry F. Walradt

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 249]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
2,300,000— 2,400,000.....	1%	2,400,000	1,000	17,050	.7104	126/10,000
2,400,000— 2,500,000.....	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000— 2,600,000.....	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000— 2,700,000.....	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000— 2,800,000.....	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000— 2,900,000.....	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000— 3,000,000.....	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000— 3,100,000.....	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000— 3,200,000.....	"	3,200,000	"	25,050	.7828	70,10,000
3,200,000— 3,300,000.....	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000— 3,400,000.....	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000— 3,500,000.....	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000— 3,600,000.....	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000— 3,700,000.....	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000— 3,800,000.....	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000— 3,900,000.....	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000— 4,000,000.....	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000— 4,100,000.....	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000— 4,200,000.....	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000— 4,300,000.....	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000— 4,400,000.....	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000— 4,500,000.....	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000— 4,600,000.....	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000— 4,700,000.....	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000— 4,800,000.....	"	4,800,000	"	41,050	.8552	31/10,000

4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000
5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000

[fol. 250]

5,300,000—	5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000

[fol. 251]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
7,800,000— 7,900,000.....	1%	7,900,000	1,000	72,050	.9120	11/10,000
7,900,000— 8,000,000.....	Do.	8,000,000	Do.	73,050	.9131	11/10,000
8,000,000— 8,100,000.....	"	8,100,000	"	74,050	.9141	11/10,000
8,100,000— 8,200,000.....	"	8,200,000	"	75,050	.91524	10/10,000
8,200,000— 8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000— 8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000— 8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000— 8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000— 8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000— 8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000— 8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000— 9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000— 9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000— 9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000— 9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000— 9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000— 9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000— 9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000— 9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000— 9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000— 9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000— 10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000— 10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000— 10,200,000.....	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000— 10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000

10,300,000— 10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000— 10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000
10,500,000— 10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000— 10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000— 10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000

[fol. 252]

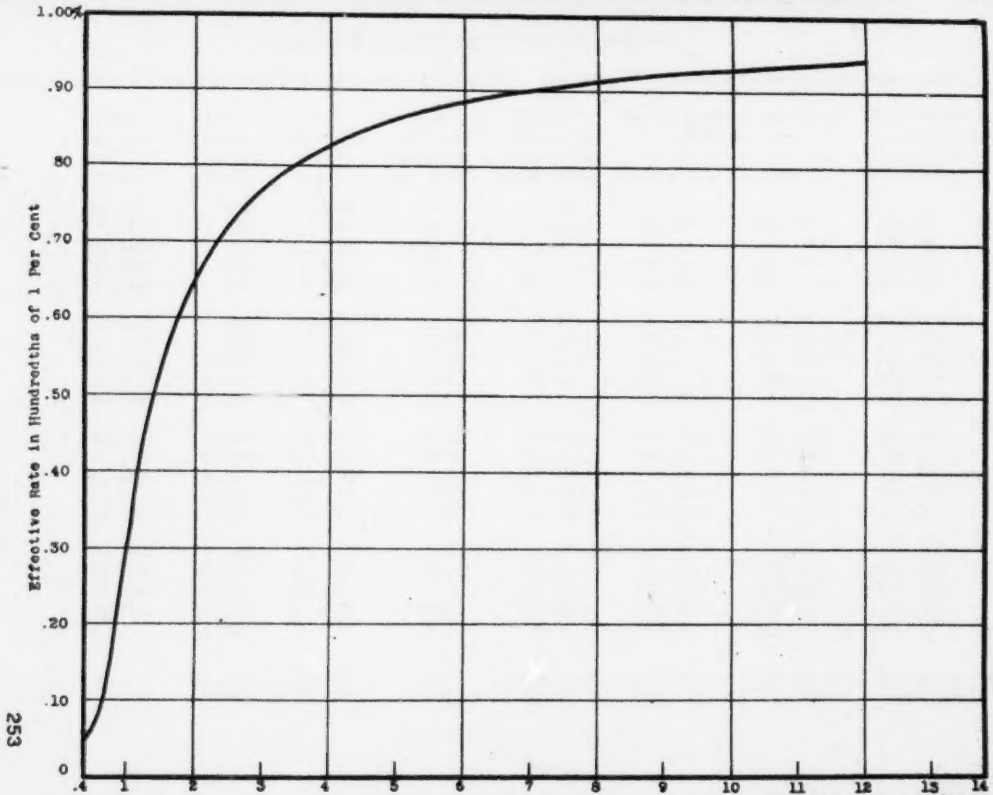
10,800,000— 10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000— 11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000— 11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000— 11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000— 11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000— 11,400,000.....	"	11,400,000	"	107,050	.93904	5,10/000
11,400,000— 11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000— 11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000— 11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000— 11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000— 11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000— 12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows Exhibit D to Affidavit of Henry F. Walradt, side folio 253.)

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



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4853-2

170A

[fol. 254] EXHIBIT E to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	**120.00**	113.75+	**150.00**	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65−	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.72+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	**103.88**−	109.95+	**109.98**+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
[fol. 255]									
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

EXHIBIT E to Affidavit of Henry F. Walradt—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates: Gross sales	Ratio between successive effective rates: Net income	Ratio between successive taxes as computed: Gross sales	Ratio between successive taxes as computed: Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105.38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

[fol. 256]

EXHIBIT F to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates: Gross sales	Ratio between successive effective rates: Net income	Ratio between successive taxes as computed: Gross sales	Ratio between successive taxes as computed: Net income
100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

1,100,000.....	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000.....	36,000	5,050	6,550	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000.....	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000.....	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000.....	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000.....	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000.....	51,000	10,050	11,390	.5912	23.33+	104.53−	103.76+	111.05−	110.26+
1,800,000.....	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000.....	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000.....	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+
[fol. 257]									
2,100,000.....	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000.....	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.97−
2,300,000.....	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000.....	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000.....	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000.....	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000.....	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000.....	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000.....	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000.....	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000.....	93,000	24,050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000.....	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000.....	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000.....	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	105.46+
3,500,000.....	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000.....	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000.....	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000.....	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000.....	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000.....	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

[fol. 258]

EXHIBIT G to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65−	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18−	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106.13+	138.64−	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−
[fol. 259]									
2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−

2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−
2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101.05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−
[fol. 260]									
7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

(Here follow Exhibits H, I, and J, side folios 261, 262, 263, 264, and 265.)

EXHIBIT "H" - TO AFFIDAVIT OF HENRY P. WALRADT

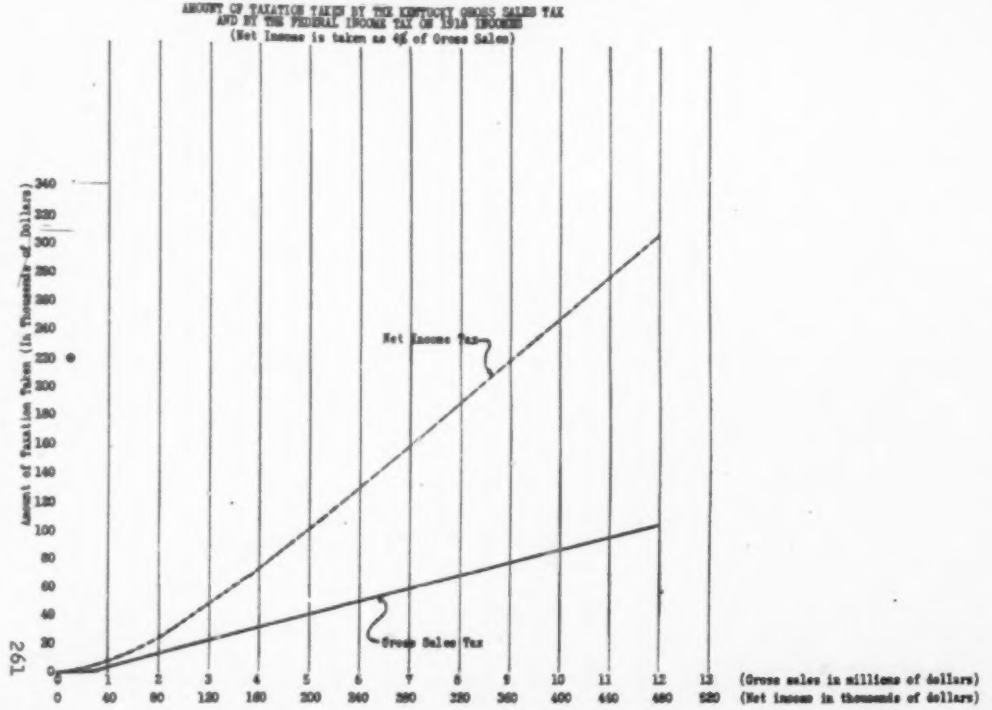
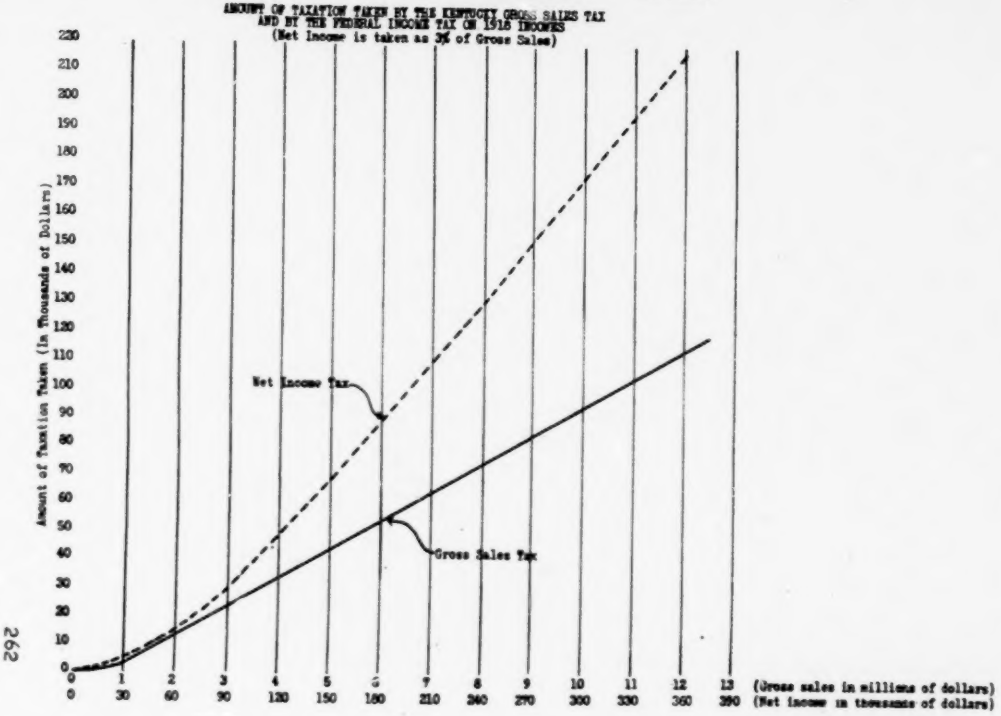


EXHIBIT "I" - TO AFFIDAVIT OF HENRY F. WALRADT



262

1768

EXHIBIT "J" - TO AFFIDAVIT OF HENRY F. WALRADT

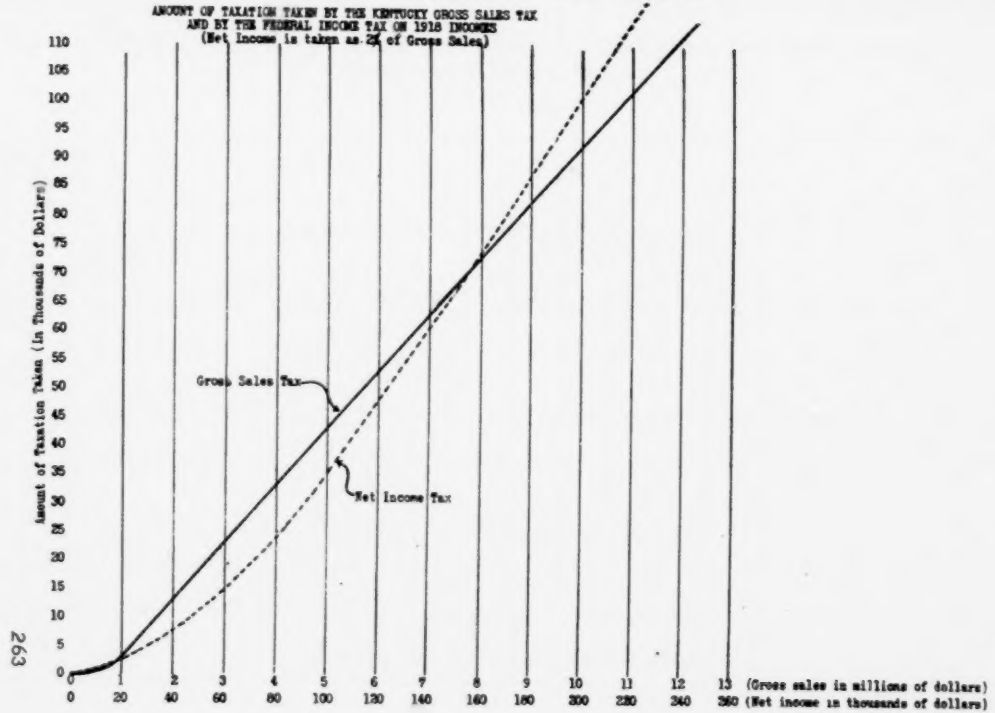
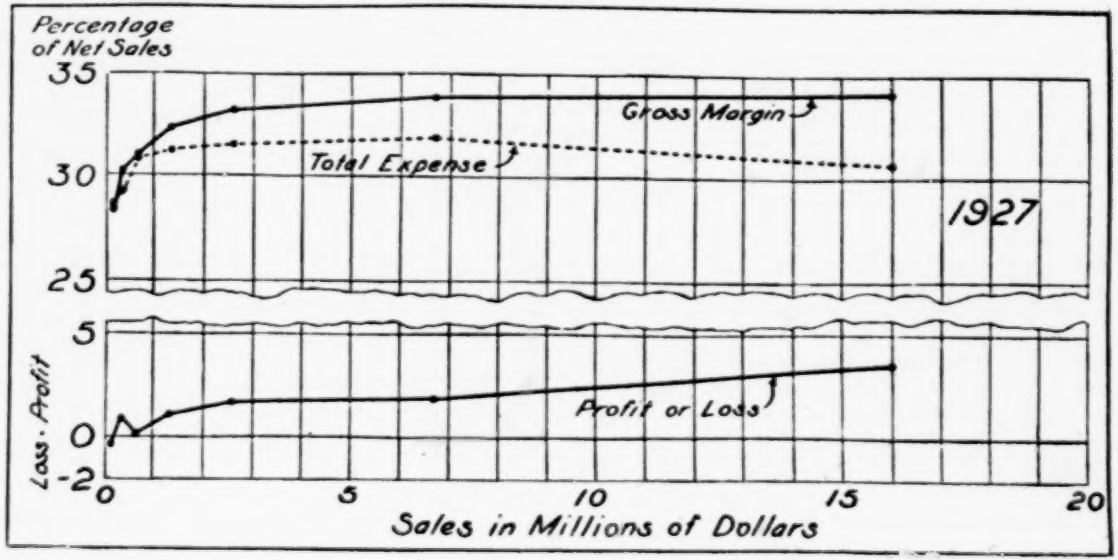


Chart 1. **Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927**

(Based on 508 Reports)



264
149
1761

Department Stores: 1928
(Based on 413 Reports)

[fol. 266] AFFIDAVIT OF JAMES W. MARTIN

Affidavit of James W. Martin in Opposition to Plaintiff's Motion for Interlocutory Decree

JAMES W. MARTIN, first being duly sworn, says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Professor of Economics and Director of the Bureau of Business Research in the College of Commerce and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Association.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of [fol. 267] the University of Chicago, I was detailed to Washington for investigation in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit corporation engaged in investigating State, local, Federal, and foreign tax systems.

Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, the National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

[fol. 268] I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

[fol. 269] 3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this question should throw some light on the economic justification

for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statis- [fol. 270] tics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors, which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and extensive as to be unthinkable, be impugned. In other words,

the exhibits below are to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

[fol. 271] I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

[fol. 272] A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers, whether operating in chains or not, are set forth in the

exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold [fol. 273] at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928, and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

[fol. 274] The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owed capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

[fol. 275] Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail

specialty stores scattered over the United State-. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there [fol. 276] is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could [fol. 277] be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore, that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will

be correspondingly large. Certain allowance for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appears as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory.

[fol. 278] Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of the page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turn-over is a significant fact in retailing efficiency. That merchant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business.

Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

[fol. 279] That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turnover, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of [fol. 280] the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and [fol. 281] that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 282] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in

general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection shoud be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a co-[fol. 283] operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made to include as many as possible of the principal retailers whose operating results could be determined, whether

directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis [fol. 284] in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column in comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that, if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have [fol. 285] presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a decidedly lower rate on owned investment, and the smallest

group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, if these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislature, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same [fol. 286] source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Kentucky to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost

equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large [fol. 287] number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute [fol. 288] would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, these who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not, except in rare instances, constitute so severe a burden on merchants as to make it impossible for them to continue

in business. Indeed, the scale of rates provided will tend to bring about, but will not completely effect, an equalization of the tax burdens imposed on retail merchants of different sizes.

James W. Martin.

(Duly verified.)

[fol. 289] EXHIBIT NO. I TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as shown above		36	2.8%	36	2.1%
Over $1,000,000			28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 290] EXHIBIT NO. II TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as shown above		121	2.3%	140	3.0%
250,000– 499,000			69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 291] EXHIBIT NO. III TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000– 49,000	69	Loss 0.7
50,000– 99,000	40	1.1
100,000–499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University.

[fol. 292] EXHIBIT NO. IV TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as indicated below			
500,000 to 2,000,000	29	11.5				
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as indicated above		36	8.9%	36	7.0%
Over $1,000,000			28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 293] EXHIBIT NO. V TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 294] EXHIBIT NO. VI TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (-000 omitted)	II Inventory, Dec. 31 cost (-000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 295]

EXHIBIT No. VII TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data(1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	..	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	..	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	..	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	..	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	..	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	..	52,402,610	6,637,912	232	7.89	225,873

[fol. 296] EXHIBIT NO. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

[fol. 297] EXHIBIT NO. VIII TO AFFIDAVIT OF JAMES W. MARTIN

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co	896,719,959	14,134,788	121,247,407	1,211,462	1.58	1.00
Kroger Grocery & Baking Co	286,611,215	12,635,115	63,940,978	1,500,620	4.41	2.35
S. S. Kresge Co	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co	303,047,172	2,422,358	136,397,650	505,615	.80	.37
J. C. Penny Co	209,690,417	2,164,974	76,955,489	657,360	1.03	.85
Sears Roebuck & Co	455,360,619	761,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co	60,628,672	675,623	224,159,596	495,410	1.11	2.05
W. T. Grant Co	65,448,298	617,436	12,987,769	86,304	.94	.66
J. J. Newberry Co	27,789,369	451,279	19,020,685	245,620	1.62	1.29
Walgreen Co	4,680,305	448,953	2,133,774	95,580	9.59	4.48
McCrory Stores Corporation	44,706,253	437,011	37,935,356	213,447	.98	.56
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	3.85	1.18
Melville Shoe Corp	25,520,675	377,824	7,029,269	64,357	1.48	.92
S. H. Kress Co	18,427,479	370,770	9,467,722	88,771	2.01	.94
Schulte United	10,363,432	362,040	16,771,348	205,836	3.49	1.23
G. C. Murphy Co	15,726,651	297,544	4,457,129	66,358	1.89	1.49
American News Co	37,021,107	264,160	4,584,269	14,631	.71	.32
Reliable Stores Corp	14,055,480	248,714	346,911	.....	1.77	...
Jewel Tea Co., Inc	16,844,110	207,498	7,559,542	8,604	1.23	.11
Edison Brothers Stores, Inc	3,778,460	204,806	1,536,146	59,941	5.42	3.90

* Source: Records of Kentucky State Tax Commission.

Western Auto Supply Co	15,959,440	204,658	6,563,989	26,300	1.28	.40
Sterchi Brothers Stores, Inc	7,870,435	200,617	7,584,514	84,729	2.55	1.12
Childs Co	24,127,725	165,050	9,433,572	3,009	.68	.03
Lerner Stores Corp	19,077,143	125,160	4,973,000	7,000	.66	.14
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	.51	.42
D. A. Schulte, Inc	18,027,784	104,105	25,502,290	16,000	.58	.06
United Cigar Stores Co. of America	69,461,594	89,055	23,465,685	22,385	.13	.10
Feltman & Curme Shoe Store Co	7,671,195	72,309	2,066,232	10,183	.94	.49
Schiff Co	5,364,922	71,474	1,436,827	12,706	1.33	.88
B. & G. Sandwich Shops, Inc	3,404,523	65,476	1,360,932	10,231	1.92	.75
C. F. Adams Co	3,180,260	51,626	471,062	5,882	1.62	1.25
National Bellas Hess Co	42,448,047	45,573	8,853,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc	481,260	41,678	53,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc	1,148,864	23,935	726,350	9,093	2.08	1.25
Nunn Bush Shoe Co., Inc	2,785,483	21,792	1,124,325	6,050	.78	.54
Metropolitan Chain Stores	18,095,858	13,200	14,506,000	27,600	.07	.19

[fol. 298] EXHIBIT NO. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 299] EXHIBIT NO. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34-35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folios 300 and 301.)

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[fol. 302] EXHIBIT NO. XIII TO AFFIDAVIT OF JAMES W. MARTIN

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	2.8	395,774	261,376	32.67	21.58
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	3,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,489	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co.	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co.	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Maxwells, Inc.	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoe	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co.	18,427,479	370,770	9,467,722	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co.	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp.	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co.	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc.	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89
Western Auto Supply	15,959,440	204,658	6,563,989	26,300	2.32	4,748	4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51

EXHIBIT No. XIII TO AFFIDAVIT OF JAMES W. MARTIN—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Childs Co.	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc.	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co.	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co.	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	65,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Stores	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

[fol. 303] APPENDIX TO EXHIBIT NO. XIII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co.	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co.	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co.	443,453,000	36,479,000	8.2*
Montgomery Ward & Co.	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co.	.....	.....	6.8c
Walgreen Co.	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc.	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co.	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co.	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp.	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co.	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196	38,678b	.50b
Schiff & Co.	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. *v.* Ky. Tax Commission *et al.*

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

[fol. 304]

EXHIBIT No. XIV TO AFFIDAVIT OF JAMES W. MARTIN

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co.	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co.	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co.	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co.	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co.	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co.	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co.	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co.	27,789,369	451,279	15,055,500	243,899	6.8	30,687	30,436	12.58	12.48
Walgreen Co.	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc.	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp.	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co.	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte-United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co.	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co.	37,021,107	264,160	16,048,861	113,947	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp.	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co.	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc.	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

Western Auto Supply Co.....	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc....	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.....	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.....	19,077,143	125,160	6,191,136*	40,861	3.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.....	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.57d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.....	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.....	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc...	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.....	3,180,260	51,626	1,805,826	29,254	2.34d	1,208d	1,234d	4.13d	4.22d
National Bellas Hess Co.....	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc..	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc.....	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.....	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's *Investment Manual: Industrials, 1930.*

[fol. 305] EXHIBIT NO. XV to AFFIDAVIT OF JAMES W. MARTIN

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.1	3.5	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade, "*Harvard Business Review*, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	26.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.3	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, *op. cit.*, p. 249.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 306]

EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,000	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P.	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co.	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co.	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co.	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co.	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. Childs Co.	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co.	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co.	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co.	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc.	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co.	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co.	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co.	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 307] EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN (Continued)

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp.	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co.	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co.	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc.	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co.	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 308]

AFFIDAVIT OF CLYDE WILLIAM PHELPS

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

CLYDE WILLIAM PHELPS, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

[fol. 309] I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?

2nd. Is the tax confiscatory?

3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real justification of a tax as a revenue measure rests funda-

mentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field [fol. 310] of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 311] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability [fol. 312] to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduated tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penney Company and others make it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages pos- [fol. 313] sessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four percent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting

chain prices as were certain entirely independent merchants."

[fol. 314] The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, [fol. 315] which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable.

Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers doing [fols. 316 & 317] a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

(Duly verified.)

[fol. 318] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is thirty-seven years of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections [fol. 319] of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that [fol. 320] immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky; that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions [fol. 321] for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year 1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to pro-

tection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and [fol. 322] that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been con-

victed on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; [fol. 323] no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the insane in Kentucky; the Central State Hospital at Lakeland, Kentucky, erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930, was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31,

[fol. 324] 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states [fol. 325] it is the plan of the State Board of Charities and Corrections to establish an institution or colony for the epileptics of this State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross

Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted [fol. 326] of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfactory. He states that the cell block in the Women's Department is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited ca-

pacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly.

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect [fols. 327 & 328] of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

Affiant further states that architects have been employed by the State Board of Charities and Corrections who have

drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

Further affiant saith not.

B. T. Brewer.

(Duly verified.)

[fol. 329] ENTRIES IN SENATE JOURNAL

House Bill 111—In the House

January 21, 1930.

By Mr. J. D. Via.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

To Committee on Kentucky Statutes.

February 14, 1930.

By Mr. J. D. Via of the Committee on Kentucky Statutes.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

With a Committee Amendment thereto by way of Substitute therefor.

February 18, 1930.

Mr. Via moved that the Rules be suspended and that a bill entitled

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth,

Be made a Special Order for Wednesday, February 19, at eleven o'clock A. M.

Said motion was agreed to.

The hour of eleven o'clock having arrived, that being the hour heretofore set for the Special Order of the Day, the House took up for consideration from the Orders of the Day said Special Order, to-wit, a bill entitled:

H. B. 111. An Act relating to revenue and taxation, imposing an excise or license tax on merchants, as the word "Merchant" is defined in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing [fol. 330] fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

With a Committee Amendment thereto by way of substitute therefor.

(See certified copy of bill attached hereto.)

The yeas and nays being required thereon by Messrs. Ardery and Peters, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
U. G. Anderson,
Wm. B. Ardery,
W. O. Baxter,
S. A. Blackburn,
D. C. Bradley,
T. L. Britton,
John Young Brown,
Wm. A. Eimer,
J. O. Evans,
Virgil Eversole,
F. A. Gnau,
H. G. Handmaker,
J. F. Harrison,
Robt. L. Horn,
C. E. Houck,
Grover C. Johnson,
J. Roy Johnson,
A. R. Kincheloe,
H. R. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
Dr. R. A. Byers,
J. J. Davis,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
J. W. Edwards,
Graland Embry,
Joseph B. Everhart,
John B. Furlong,
L. B. Hamilton,
Geo. H. McIntosh,
T. R. McRoberts,
Henry Meiman,
Clarence Miller,
Russell O. Miller,
F. Tyler Munford,
L. B. Murphy,
Andrew W. Nichols,
Fred A. Nolte,
Cabel A. Page,
James I. Peters,

W. K. Randall,
H. L. Taylor,
C. B. Truesdell,
J. E. Walters,
G. W. Wiggonton,
J. Watt Brown,
John H. Pickett,
Dorsey Ratcliff,
Thomas H. Troxel,
H. Speed Tye,
Dr. Vallandingham,
Robert Williams.

Those who voted in the negative were:

E. S. Allison,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Leonard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
Kelly J. Francis,
H. L. Jackson,
M. F. Jordan,
John B. Klefot,
Frank LeBus,
Martin Light,
James A. May,
Harry J. Meyers,

[fol. 331]

M. F. Moore,
B. T. Morris,
Curtis F. Park,
J. D. Patton,
John W. Preston,
D. O. Stanley,
Frank L. Strange,
E. J. Thomas,
J. D. Via,
L. M. Weathers,
Elmer J. Terry.

The substitute as offered by the Committee was then adopted as amended.

Ordered that said bill be engrossed and read the third time.

The Constitutional provisions as to the third reading of said bill at length being dispensed with and the same being engrossed, said bill was read the third time by its title only and passed.

The yeas and nays being taken thereon in accordance with the provisions of the Constitution, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
L. A. Allison,
J. J. Davis,
Winn Davis,

U. S. Anderson,
S. A. Blackburn,
L. C. Bradley,
T. L. Britton,
John Young Brown,
J. Watt Brown,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Leonard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
Henry Mieman,
J. W. Edwards,
Clarence Miller,
M. F. Moore,
F. Tyler Munford,
M. L. Napier,
Curtis F. Park,
John H. Pickett,
Dorsey Ratliff,
Frank L. Strange,
Elmer J. Terry,

[fol. 332]

Thos. H. Troxel,
H. Speed Tye,
J. E. Walters,
G. W. Wigginton,
William A. Eimer,
Graland Embry,
J. O. Evans,
Joseph B. Everhart,
Virgil Eversole,
Kelly J. Francis,
John B. Furlong,
F. A. Gnau,
L. B. Hamilton,
H. G. Handmaker,
Rev. B. L. Hargrove,
Robert L. Horn,
C. E. Houck,
R. L. Jackson,
Grover C. Johnson,
Theron M. Johnson,
J. R. Johnson,
M. F. Jordan,
A. R. Kincheloe,
John B. Klefot,
Frank LeBus,
Martin Light,
H. F. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
James A. May,
George R. McIntosh,
Harry J. Meyers,
T. H. McRoberts,
Russell O. Miller,
B. T. Morris,
L. B. Murphy,
Fred A. Nolte,
J. D. Patton,
John W. Preston,
D. O. Stanley,
H. L. Taylor,
E. J. Thomas,
C. B. Truesdall,
J. D. Via,
L. M. Weathers,
Robert Williams.

Those who voted in the negative were:

W. O. Baxter,	Cabel A. Page,
J. Roy Johnson,	Dr. Vallandingham.

Mr. Via offered the following amendment to the title of said bill, viz:

"Amend the title to said bill by striking from the original bill the title thereof and substituting the title of the substitute for the title of the bill which is in words and figures as follows: * * *"

(For this title see title to Substitute in Journal of today ante.)

Said Amendment was agreed to.

Resolved that the title thereof be as amended.

Mr. Via moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

[fol. 333] Said last named motion was agreed to.

Mr. Dorman moved that the session of today be extended indefinitely.

Said motion was agreed to.

Mr. Dorman moved that when the hour of twelve o'clock Merid-an arrived today that the House do then recess for one hour.

Said motion was agreed to.

[fol. 334] I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the three (3) typewritten pages hereto attached, were by me carefully compared with the official senate journal (Senate Journal 1930 Session of the General Assembly, in the hands of the public printer) and found to be a true and correct copy of entries in said journal relating to the introduction, passage and approval and enrollment of House Bill 111 of said 1930 Session.

Ella Lewis, Secretary of State. (Seal Office of Secretary of State, Commonwealth of Kentucky.)

[fol. 335] Journal of the Senate

February 20, 1930.

The hour of 1.30 P. M. having arrived, the Senate reconvened.

A message was received from the house that they had passed the following bills:

"H. B. 111. "An Act relating to revenue and taxation, imposing an Excise or License Tax on retail merchants as the words 'retail merchants' are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

To Committee on Revenue and Taxation.

February 28, 1930.

Committee Reports

Senator Booles, of the Committee on Revenue and Taxation, to which had been referred bills of the following title:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Reported with expression of opinion that same ought to pass.

March 3, 1930.

Calendar

Senator Chandler moved that the second reading at length of said bills be dispensed with, and said bills be read by their titles only.

Said motion was agreed to.

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; de-

claring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

[fol. 336] March 4, 1930.

The Senate took up for consideration from the Orders of the Day a bill entitled:

H. B. 111. "AN ACT relating to revenue and taxation, imposing and excise or license tax on retail merchants as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Senator Dacher offered the following Amendment:

"Amend House Bill 111 by inserting the word 'Cash' between the words 'gross' and 'sales' in lines number 4, 5, 7, 9, 12, 15, 17, 20 and 22 on page 2 and in lines number 10 and 26 on page 3 of the printed bill, and by adding to said bill as Section 14 thereof the following:

"Section 14. Gross cash sales are hereby defined to be sales made where cash, checks or anything of value are exchanged for goods, wares, or merchandise on the day of sale; also goods, wares, or merchandise sold on cash on delivery."

The question being taken thereof, it was decided in the negative, and said Amendment was lost.

Senator Gates Young offered the following Amendment:

Amend House Bill No. 111, section two in line six by striking out the words "or less" and inserting in lieu thereof 'in excess of the first $50,000.00.' "

"Further amend by inserting the words 'except those doing an annual gross of $50,000.00 or less' after the word 'Merchant' and before the word 'as' in line one of section three."

The question being taken thereon, it was decided in the affirmative, and

Said amendment was lost.

Said bill reads as follows:

* * * * * * *

(See certified copy filed herewith.)

Ordered that said bill be read the third time.

Mr. Allie Young moved that the third reading of said bill be by its title only. Said motion was agreed to by a majority of the members elected. The constitutional provision as to [fol. 337] the third reading of said bill at length being dispensed with.

Said bill was read the third time by its title and passed.

The yeas and nays being taken on the passage of said bill in accordance with the provision of the Constitution were as follows, viz:

Resolved that the title thereof be as aforesaid.

Mr. Allie Young moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

Said motion was agreed to.

Roll Call

Senate, March 4, 1930, Session 1930

	Yea	Nay
Adams, Samuel W.	1	..
Bartlett, Clarence	2	..
Bond, N. U.	3	..
Bondurant, Jas. H.	4	..
Booles, W. W.	..	1
Brock, H. M.	5	..
Brooks, O. H.	..	1
Chandler, A. B.	6	..
Cline, H. M.	7	..
Dacher, Frank	8	..
Davis, W. H.	..	2
Dawson, Edwin C.	9	..
Fitspatrick, H. D.	10	..
Franklin, Chas. G.	..	3
Gaines, P. B.	11	..
Gartin, O. C.	12	..
Glenn, R. E.	13	..
Holloway, Jno. S. W.	14	..
Jacobs, Silas	15	..
Johnson, Alex. E.	..	4
Littrell, L. C.	16	..
Luker, C. R.	17	..
McBrayer, J. J.	18	..
McCaw, C. W.	..	1

Moore, E. C.	19	..
Pogue, Marion F.	20	..
Poole, J. V.	..	5
Regenstein, Ellsworth	21	..
Rose, Dr. J. M.	..	6
Ryans, Dr. L.	..	7
Stewart, Joe	22	..
Turner, T. O.	23	..
Vincent, B. M.	..	8
White, Frank M.	24	..
Williams, Sewell B.	25	..
Yates, W. A.	26	..
Young, Allie W.	27	..
Young, Gates F.	..	9
Yea		27
Nay		11

[fol. 338] AN act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisons of this Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. The words "retail merchant," as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any "store," as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term "store," as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same "retail merchant," as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every "retail merchant" and "store," as defined herein, which is controlled or held with others by

majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and postoffice address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other

facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascer- [fol. 339] tain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for any pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is

authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act,

or any prosecutions for any other infraction of the tax laws of this State.

§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or [fol. 340] shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at

law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitations of two years herein imposed.

§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

Approved March 17, 1930.

[fol. 341] [Endorsed:] Gross Retail Sales Tax Law of the State of Kentucky. Enacted by the General Assembly, Session 1930. Effective on and after March 17th, 1930. State Tax Commission, Frankfort, Ky.

[fol. 342] COMMONWEALTH OF KENTUCKY,
Frankfort, Ky.:
Office of Secretary of State

I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the foregoing bill has been

carefully compared with the original enrolled bill now in my official custody as Secretary of State and remaining on file in my office and found to be a true and correct copy of the enrolled bill passed by the General Assembly of Kentucky, 1930 Session, approved by the Governor March 17, 1930, and known as the Gross Retail Sales Tax Law.

In Witness whereof I have hereunto set my hand and affixed my official seal.

Done at Frankfort this 5th day of February, 1931.

Ella Lewis, Secretary of State.

[Seal Commonwealth of Kentucky, Office of Secretary of State.]

[fol. 343] In United States District Court

Order Approving Statement of Evidence

It appearing that the herewith and foregoing statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all the evidence relevant and material to a hearing of questions to be presented on the appeal in said action,

It is, therefore, ordered that the same be allowed, settled and approved as a true, complete and correct statement of the evidence of said action.

Dated this 23 day of March, 1932.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 344] In United States District Court

Order Continuing Temporary Restraining Order, Etc.—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon.

Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harman Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,
L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 345] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for an interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the

introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 346] In United States District Court

Kroger Grocery & Baking Company, Plaintiffs,

vs.

John B. Lewis, Selden Glenn, and Henry M. Cline, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

Opinion—Filed Dec. 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the

Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from [fol. 347] its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute

must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized [fol. 348] by Section 10 against the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Fed-

eral Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 349] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that [fol. 350] the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes

were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the state court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General [fol. 351] Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides

for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 352] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section

4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deductible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized [fol. 353] by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequafe remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 354] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when

the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 355] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 356] In United States District Court

Decree—Dec. 9, 1931

This cause having been heard by consent of parties, together with the causes of Fred Levy et al., against the same defendants, and the J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking

Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any in-
[fol. 357] junctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be rea-

sonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, [fol. 358] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fol. 359] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—January 7, 1932

This day came the parties in the above-styled three causes, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed, in compliance with the order and decree of this court entered herein December 9, 1931, conditioned as therein provided, to secure the Commonwealth of Kentucky on account of its

claims for taxes for the years 1930 and 1931, together with interest, court costs and all other proper charges that may accrue thereon against the following named taxpayers respectively:

The Stewart Dry Goods Company,
Levy Bros.,
J. C. Penney Company,
Kaufman Straus Company,
H. P. Selman & Company,
Montgomery Ward & Co., Incorporated;
Herman Straus & Sons Company, Inc.;
J. Bacon & Sons,
John C. Lewis Company, Inc.;
Central Furniture Company,
Byck Bros. & Co., Inc.;
Ewing-Von Allmen Dairy Company, Inc. (Successors to D. H. Ewing's Sons);
Hook Drug Company, Inc.;
S. M. Goldberg Operating Co.,
Ben Snyder, Inc.

Said bonds with their respective sureties and/or securities deposited and pledged thereon are hereby accepted and approved as a compliance with the order and decree of this Court above-mentioned.

Chas. I. Dawson, Judge.

[fol. 360] In United States District Court

Stipulation re Substitution—Filed March 1, 1932

This day, came the parties herein, by counsel, and stipulated that J. Dan Talbot, a citizen and resident of the Western District of Kentucky, was duly elected Auditor of Public Accounts of the Commonwealth of Kentucky at the November election in 1931; that the term of office of Clell Coleman as Auditor of Public Accounts expired on January 4, 1932, whereupon the said Coleman left said office and the said J. Dan Talbot, on said date, duly qualified and took the oath of office as Auditor of Public Accounts of the Commonwealth of Kentucky, succeeding said Coleman, and

is now the duly qualified Auditor of Public Accounts of the Commonwealth of Kentucky.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Counsel for Plaintiff. S. H. Brown, Counsel for Defendants.

[fol. 361] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING AUDITOR OF PUBLIC ACCOUNTS, ETC.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 362] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 1, 1932

The plaintiff, The Stewart Dry Goods Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants

as prayed in the motion of plaintiff for such interlocutory injunction, hereby appeals to the Supreme Court of the United States from said order and decree denying its motion for an interlocutory injunction as prayed therein.

The plaintiff, further conceiving itself aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss this plaintiff's bill of complaint and directs the dismissal of said bill of complaint and denies to this plaintiff a permanent injunction or any injunctive or other relief prayed by it and adjudges that plaintiff's said bill of complaint be dismissed and that the defendants recover of plaintiff their costs in this cause expended, hereby appeals to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to this plaintiff a permanent injunction, or any injunctive or other relief prayed by it, and decrees that its said bill of complaint be dismissed and that the defendants recover of this plaintiff their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein [fol. 363] designated of said order and decree herein appealed from.

Plaintiff prays that its said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered to be duly authenticated and sent to the Supreme Court of the United States.

The Stewart Dry Goods Company, by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

[fol. 364] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 1, 1932

The plaintiff, by counsel, respectfully represents that in the records and proceedings had in the above-entitled cause and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiff makes the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiff's motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiff's bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill as unconstitutional and hereinafter, for brevity, referred to as the challenged Act, affords to the plaintiff a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to the plaintiff by any provision of Kentucky law is plain or adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiff.

[fol. 365] (3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiff in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the amount of any illegal tax exacted of plaintiff, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its Auditor of Public Accounts as its representative, that might be brought by plaintiff in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts as its representative, might be sued at law in any court of the United States in an action by plaintiff for the recovery of illegal taxes exacted of it under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest [fol. 366] thereon, might be recovered in any action in any court of the United States, or in any other court except a court of competent jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky, against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiff under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

(10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreasonable delay would be encountered by plaintiff in obtaining a refund or a recovery of illegal taxes exacted of plaintiff under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when [fol. 367] presented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiff in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-618, to the effect that it is the duty of the Treasurer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

(14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiff any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and

[fol. 368] to the prompt administration thereof, as the remedy in equity herein sought by plaintiff.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiff.

(16) The Court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiff on taxes illegally exacted of it under the challenged Act.

(17) The Court erred in holding that plaintiff, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to it pursuant to any such judgment, can legally or equitably be required, upon the non-payment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

(18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiff under said Act in successive years during the pendency of suits testing the validity of such Act.

[fol. 369] (19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiff pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of itself and a numerous class of other retail merchants similarly situated, more than forty of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the

constitutionality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims herein asserted by plaintiff on its own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law by plaintiff and numerous other retail merchants similarly situated, as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S. 613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

[fol. 370] (2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail mer-

chants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal protection Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 371] (4) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiff's motion for an interlocutory injunction, that the challenged Act, in its actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiff the equal protection of the law in that, in practical effect, it operates to impose upon plaintiff a grossly excessive and disporportionate burden of the taxes levied under said Act, merely because of the larger volume of plaintiff's gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, competitors of the plaintiff engaged in the same general business of

retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(6) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act unjustly and unreasonably discriminates against plaintiff and other retail merchants similarly situated, because, in its actual [fol. 372] operation and effect, said challenged Act exempts from its burdens a vast number of competing retail merchants doing business in Kentucky, in that this plaintiff, upon its gross retail sales, which aggregate for the taxable portion of the year 1930 $3,209,717.39, is subjected by said Act to a tax of $25,147.17 less a possible credit of $1,279.11 (which includes a disputed credit of automobile license taxes of $271.04) or a minimum tax exacted of this plaintiff amounting to $23,848.06, while at the same time, out of approximately 25,000 retail stores competing with this plaintiff, doing business in Kentucky and having an annual volume of gross retail sales in Kentucky approximating $535,000,000.00, nearly one-third of them are wholly exempted from any tax whatever, and, as shown by the evidence at the hearing of actual returns made to the State Tax Commission, 16,353 retail merchants competing with this plaintiff, who have reported for the taxable period of the year 1930 gross sales aggregating $247,923,309.00, actually pay in taxes, in the aggregate, only $63,096.66 or less than $3.80 each on the average.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky in that said Act, in each of the particulars specified in assignments (1) to (6), both inclusive, under this heading II, captioned "Additional Assignments of Errors Committed by the Court in its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

[fol. 373] (8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that, as to taxes claimed of plaintiff on account of sales made in the period between March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of this plaintiff under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respect said challenged Act denies to this plaintiff the guaranty and protection of due process of law afforded to it under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(9) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act imposes an unconstitutional burden upon the business of this plaintiff conducted in interstate commerce between plaintiff's store in Louisville, Kentucky, and its customers residing in the State of Indiana, as set forth in the affidavit of Robert J. McKim filed at the hearing, and thus the Court erred in failing to hold the challenged Act to be unconstitutional and void as violative of the Commerce Clause of the Federal Constitution.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiff prays that each of said decrees herein appealed from, namely, the interlocutory decree and the final decree as hereinbefore [fol. 374] set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 375] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL, ETC.—March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by praecipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages, required herein, [fols. 376 & 377] shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 378 & 379] Bond on appeal for $1,000, approved and filed March 1, 1932, omitted in printing.

[fol. 380] Citation, in usual form, showing service on John B. Lewis et al., filed March 1, 1932, omitted in printing.

[fol. 381] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 23, 1932

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. Bill of complaint.
2. Order permitting plaintiff to sue on behalf of all others similarly situated, pursuant to Equity Rule 38.
3. Motion for temporary restraining order.
4. Motion for interlocutory injunction.
5. Temporary restraining order.
6. Order noting appearance of defendants entered by S. H. Brown, Assistant Attorney General, and filing notice required by Statute to be given to Governor, Attorney General and defendants herein, duly acknowledged, and
7. Agreed order that this case be heard with numbers 610 and 611 simultaneously with similar motion in case of Kroger Grocery and Baking Company v. John B. Lewis, et al.
8. Motion of defendants to strike certain allegations of plaintiff's bill of complaint.

[fol. 382] 9. Motion of defendants to dismiss plaintiff's bill of complaint.

10. Answer of defendants.
11. Stipulation as to evidence reduced to narrative form and heard upon plaintiff's motion for an interlocutory injunction, (same being filed herewith).
12. Order reading affidavits and other evidence and submitting the case.
13. Opinion of the Court.
14. Order and decree denying interlocutory injunction, and dismissing bill of complaint and continuing temporary

restraining order in effect pending appeal upon the giving of bond, entered on December 9th, 1931.

15. Order filing and approving bonds entered January 7th, 1931.

16. Stipulation of parties noting J. Dan Talbott as Auditor of Public Accounts succeeding the defendant, Clell Coleman.

17. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

18. Petition for appeal.

19. Assignment of errors.

20. Order allowing appeal.

21. Appeal bond.

22. Citation and endorsement of accepted service thereon.

23. This stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Solicitors for Appellees. Leslie W. Morris.

[fols. 383-386] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 387] In Supreme Court of the United States

Statement of Points to be Relied on by Appellant—Filed April 9, 1932

Appellant seeks the reversal of two distinct portions of the order and decree appealed from, namely:

(1) The order dismissing its Bill of Complaint upon the ground that it has an adequate remedy at law.

(2) The order denying its motion for an interlocutory injunction on the same ground.

The points relied on are stated separately and serially under the following headings:

I

Dismissal of Bill of Complaint

Federal jurisdiction clearly exists, and in the Federal Court this cause is essentially one of equitable jurisdiction, for the following reasons:

(1) The appellant is wholly without a remedy at law that is plain or adequate or complete within the meaning of Section 267, Judicial Code (now U. S. Code, Title 28, § 384), as expounded by judicial decisions.

[fol. 388] (2) There is no remedy whatever at law available to appellant in the Federal Courts.

(3) The Commonwealth of Kentucky has not waived its immunity from suit in any court. It has not consented to be sued, directly or indirectly, in any Federal Court, or waived immunity from suit therein.

(4) No money judgment for the recovery of taxes illegally exacted of appellant under the challenged Act can be recovered against the Commonwealth of Kentucky or any representative of it in any action brought pursuant to the terms of the challenged Act or any other law of Kentucky. The only remedy provided in such case, by any law of Kentucky, is a proceeding against the Auditor of Public Accounts by way of mandamus to compel him to draw his warrant upon the Treasurer in favor of appellant for the amount of appellant's claim when ascertained. No action by appellant for any such remedy or relief can be maintained at law in any Federal Court, and the laws of Kentucky restrict to its own courts any such remedy afforded thereby.

(5) Any such warrant upon the Treasurer eventually issued or delivered to appellant under any proceedings at law by it in either State or Federal Court is without right of priority in payment over any other warrants and is restricted to payment out of any moneys remaining in the General Fund after warrants against such Fund previously issued or preferentially handled by the Treasurer shall have been paid.

The taxes illegally exacted of appellant do not go into the General Fund at all, but are exclusively appropriated to other purposes. The General Fund of the State is not augmented thereby.

(6) Claims upon the General Fund are several years in arrears in the matter of payment; consequently any such [fol. 389] remedy at law provided by the challenged Act or by any other Kentucky statute is wholly inadequate. In order for the holder of any such warrants to realize anything on account thereof, it is necessary to hawk them about

in an effort to find a purchaser, and to sell them at a substantial discount if a purchaser can be found.

(7) This suit is a class suit brought pursuant to Federal Equity Rule No. 38, as shown by the Court's order entered of record when this suit was brought. It is properly brought in equity to avoid a multiplicity of actions because of its common or general interest to a large number of taxpayers in the same situation as appellant, and also because an overwhelming number of actions by separate taxpayers for successive years would otherwise result. Moreover, equity jurisdiction exists because of the drastic penalties provided by the challenged Act.

II

Denial of Interlocutory Injunction

The points stated under heading I are likewise relied upon under this heading II. For the sake of brevity they are not here repeated.

In addition thereto, appellant relies upon the following points in support of its appeal from the order denying its motion for an interlocutory injunction.

(1) The court below should have granted an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided in due course upon its merits. (Assignments of Errors II—1.)

(2) The challenged Act designedly denies to appellant and to other retail merchants similarly situated the equal [fol. 390] protection of the laws, by reason of its classifications prescribed in Section 2 thereof, and by reason of its exemptions and credits or deductions provided in Section 4 thereof, and by reason of the consequent widely varying rates of taxation imposed thereby, all of which clearly and designedly effect an unjust, unreasonable and arbitrary discrimination against appellant and other retail merchants having a large volume of annual gross retail sales, in favor of retail merchants who have a smaller volume of gross annual retail sales. (Assignments of Errors II—2, 3, 4, 5, 6.)

(3) The classifications prescribed in Section 2 of the challenged Act, and the exemptions and credits or deduc-

tions prescribed in Section 4 thereof, do not rest upon any reasonable basis or have any reasonable relation to the subject-matter of the Act, and they were prescribed for the express purpose of discriminating unjustly and unreasonably against appellant and other taxpayers similarly situated and denying to it and them the equal protection of the laws. (Assignments of Errors II—2, 3, 4, 5, 6.)

(4) The challenged Act is void under the Constitution of Kentucky in that it violates the fundamental principles of uniformity therein prescribed, which require that classification in the matter of taxation levied upon occupations, persons or property must rest upon some reasonable basis. (Assignments of Errors II—7.)

(5) The challenged Act is void under Section 55 of the Constitution of Kentucky insofar as it seeks to levy upon appellant taxes on account of sales made by it in the period between March 17, 1930, and June 17, 1930, because under Section 55 of the Kentucky Constitution the challenged Act could not and did not properly become operative or effective for any purpose until June 17, 1930.

In this respect, the challenged Act also violates the Due [fols. 391 & 392] Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Errors II—8.)

(6) The challenged Act violates the Commerce Clause of the Constitution of the United States in that it attempts to levy a tax upon the business of appellant conducted in interstate commerce between its store in Louisville, Kentucky, and its customers residing in other States. (Assignments of Errors II—9.)

III

A more detailed statement of the points above digested and relied upon is contained in the Assignments of Errors, to which reference is made for further particulars.

Robert S. Marx, Cincinnati, O.; Frank E. Wood, Cincinnati, O.; John C. Doolan, Louisville, Ky.; James W. Stites, Louisville, Ky., Solicitors for Appellant. Harry Kasfir, Cincinnati, O., of Counsel.

Service of a copy of the above list of points to be relied upon by Appellant in the Supreme Court of the United

States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen., Solicitors for Appellees. H. W. Batson, J. W. Welch, Leslie W. Morris.

[fols. 393 & 394] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF PORTION OF RECORD TO BE PRINTED BY CLERK

Appellant by counsel states that the entire record as filed on appeal herein is, in appellant's opinion, necessary for the consideration thereof. The Clerk is accordingly directed to print the entire record in the manner prescribed by paragraph 9 of Rule 13.

Robert S. Marx, Frank E. Woods, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors for Appellant.

Service of notice of the above direction to the Clerk in the matter of printing the record on appeal is hereby acknowledged on behalf of the Appellees.

Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Solicitors for Appellees. Leslie W. Morris.

[fol. 395] [File endorsement omitted.]

Endorsed on cover: File No. 36,642. W. Kentucky D. C. U. S. Term No. 27. The Stewart Dry Goods Company, appellant, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,642.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 28

FRED LEVY ET AL., APPELLANTS,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

(36,643)

(36,643)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 28

FRED LEVY ET AL., APPELLANTS,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

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[fol. 1] [Caption omitted]

[fols. 2 & 3]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

FRED LEVY, ARNOLD H. LEVY, STUART G. LEVY, JAMES H. Levy and S. L. Greenebaum, Partners, Trading and Doing Business under the Firm Name of Levy Bros., Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN R. GLENN and HENRY M. CLINE, Individually and as Members of the State-Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Bill of Complaint—Filed Jan. 24, 1931.

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, partners trading and doing business under the firm name of Levy Bros., bring this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, indi- [fol. 4] vidually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky and say:

I

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, are now and for more than five years past have been partners trading and doing business in Louisville, Kentucky, under the firm name of Levy Bros.

The plaintiffs are each and all citizens of the State of Kentucky and residents of Louisville, Kentucky, and inhabitants of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State

Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

[fol. 5] Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax [fol. 6] Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall be, and he is, charged under said Act with the duty

of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or [fol. 7] from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally in-

troduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

[fol. 8] For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a [fol. 9] third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain

the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the [fol. 10] House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as

originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose of said House Bill 111 was changed by amendment by the Committee to [fol. 11] which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this [fol. 12] State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail mer-

chant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of [fol. 13] one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the

nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. [fol. 14] "In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

"§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any

court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

[fol. 15] "§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend [fol. 16] to information required in prosecutions for mak-

ing false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of [fol. 17] such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein

imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the par- [fol. 18] ticular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The firm or partnership of which these plaintiffs are members has continuously conducted, under the same firm

name, the same general character of retail business for almost seventy years past, with varying changes of its members (due to death), including successively three generations of the same family. During all that time it has conducted its retail store in the same location, at Third and Market streets, in Louisville, Kentucky.

The business so conducted by said firm is that of retail merchants owning and operating a single retail store for the sale of—

[fol. 19] Men's and boys' clothing, Hats, Shoes and Furnishings,

with the addition in more recent years of—

Ladies' hosiery.

Plaintiffs conduct in their retail store what is known as a department store, embracing approximately 17 separate departments, in which they sell at retail merchandise of various kinds, of which the following are illustrations:

Men's Clothing,
Men's Clothing (Basement).
Boys' Clothing.
Boys' Clothing (Basement).
Men's Furnishings.
Men's Furnishings (Basement).
Men's Shoes.
Men's Shoes (Basement).
Boys' Shoes.
Men's Hats.
Men's Hats (Basement).
Boys' Hats.
Boys' Furnishings.
Trousers.
Ladies' Hose.
Children's Hose.
Toilet Goods.

Each of said departments is operated by plaintiffs separately from other departments, and plaintiffs' books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, including its proper proportion of rental, taxes, insurance and [fol. 20] all other overhead expense, and the net results of

such operation of each department, to the end that plaintiffs may determine, after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiffs come into competition with a large number of other stores selling merchandise of a similar character in Louisville and in other cities in Kentucky, and the same is true as to each department operated by plaintiffs in their retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, and such competition applies not only to the plaintiffs' conduct of its store as a whole but as to each unit or department therein.

[fol. 21] VIII

For many years past, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky. In all that time, the partnership has been a large taxpayer to the State of Kentucky, the City of Louisville, and the County of Jefferson, paying all annual ad valorem taxes levied thereon by competent authority for State, County and City purposes. Their firm has exerted itself with the utmost diligence and prudence to build up its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiffs.

To do this has required of the plaintiffs the closest attention to every phase of their business, including the most

careful foresight as to the class or style of goods they should stock in their store and in each department thereof to attract the public and to satisfy its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonal in [fol. 22] character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiffs have been obliged to expend each year, in the community served by them, large amounts of money for advertising in newspapers and for trade solicitation by personal letters to their customers, and circulars to the public generally, and have also expended large sums of money in the employment of skilled and competent persons to decorate their show-windows and make an inviting display of merchandise in their windows and in their store, and in the purchase of the proper equipment for such purposes. Only by such progressive methods and by the policy of continued fair dealing with the buying public, has their firm been able to build up its business and to take its own proper part in building up its city and State.

Likewise the plaintiffs have for many years past actively interested themselves in all forms of civic, cultural, religious and welfare work carried on in their city and State and contributed largely of their means and of the time of their members.

The plaintiff, Fred Levy, has been President of the National Association of Clothiers and Furnishers as well as of the Louisville Retail Merchants' Association and the Louisville Commercial Club, and of many other organiza- [fol. 23] tions engaged in civil, cultural, religious and welfare work, in addition to serving as a member of the Park Commission of the City of Louisville, in all of which capacities he has served without pay.

Likewise other members and employes of their firm have taken their part in public activities.

Plaintiffs' firm keeps its money on deposit in banks

located in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so. It has more than 175 employes at all times, ranging as high as 225 employes during the rush seasons. It pays them the highest current compensation for services of the kind rendered by them. Nearly all of its employes have been with it continuously for more than five years. Most of them have been with it for periods ranging from 10 to 50 years. Many others are actually pensioned by it. Near the end of each calendar year it gives to various employes a bonus proportioned to services rendered. Every employe in its service for as much as a year gets a vacation of one week or more on full pay.

IX

In addition to the payment of its annual ad valorem taxes, plaintiffs have paid to the State of Kentucky for the calendar year 1930, automobile license taxes in the sum of $134.61. Plaintiffs' firm is not incorporated and it does not sell articles upon the sale of which any excise or license tax is levied by the State.

[fol. 24] X

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiffs' retail store, or in plaintiffs' method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XI

[fol. 25] As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to these plaintiffs and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent. upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to these plaintiffs and all others similarly situated.

XII

During the calendar year 1930, the total gross retail sales made by plaintiffs in all departments conducted by it in their retail store aggregated $1,554,151.52, of which amount, gross retail sales aggegating $1,253,389.07 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by [fol. 26] said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	2,533.89 Tax
Total tax above computed	$5,583.89
Credit for motor vehicle licenses	134.61
Net tax levied upon Plaintiff	$5,449.28

XIII

Each of the separate departments conducted by plaintiffs in their retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. In no one department conducted by plaintiffs in their retail store (except Men's Clothing in which the gross annual sales are approximately $600,000.00) do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000, nor do the gross annual sales of any specialized retail store in Kentucky competing [fol. 27] with any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiffs and denies to them the equal protection of the law, and imposes upon them a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiffs are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiffs' department competing with said specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of plaintiffs' departments in their retail store.

[fol. 28] XIV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the rela-[fol. 29] tively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail [fol. 30] merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

[fol. 31] On the other hand, exactly the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiffs' store and

thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store and competing with plaintiffs in the sale at retail of goods of the same kind and character. Credits allowed to plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to a very significant part of the tax levied upon plaintiffs by reason of tneir annual gross sales in such department.

XV

Said challenged Act, by its terms and especially by Section 4 thereof, designedly makes or attempts to make a classification of retail merchants to be taxed thereunder, purely on the basis of whether such retail merchants are incorporated or unincorporated, and to allow to retail merchants that conduct their business in corporate form a credit upon any taxes otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them, pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in cor-[fol. 32] porate form, while at the same time denying to the plaintiffs and other retail merchants similarly situated, who are not incorporated, any equal or corresponding credit upon the taxes levied upon or assessed against them by the terms of said challenged Act.

There are many hundreds of retail merchants conducting retail stores in Kentucky who are incorporated and thus entitled under Section 4 of said Act to a credit upon any license taxes imposed upon them by said Act, which credit in hundreds of cases amounts to a complete remission of all taxes levied upon them under said Act, and in many hundreds of other cases said credit amounts to a substantial remission of all taxes levied upon the incorporated retail merchant under said Act, when at the same time these plaintiffs and other retail merchants similarly situated, who are not incorporated, must under said Act pay the taxes thereby levied upon or assessed against them, without any equal or corresponding deduction.

Such classification of retail merchants as incorporated or unincorporated and such imposition upon them of dif-

ferent rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, based solely upon such classification, are and each of them is wholly unreasonable, arbitrary, capricious, unequal, unjust, oppressive and discriminatory against these plaintiffs and all other retail merchants similarly situated, who do not con- [fol. 33] duct their business in corporate form, and said challenged Act in such respects denies to these plaintiffs and to other retail merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, the benefits of which, and of all rights given to them thereunder, are hereby specially set up and claimed by these plaintiffs on behalf of themselves and all others similarly situated.

By reason of the facts set forth in this clause and in other clauses of this bill, said challenged Act is wholly unconstitutional, null and void, under the principles of law argued by counsel and expounded by the Supreme Court of the United States in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, and similar cases.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or [fol. 34] departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise

and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Ken- [fol. 35] tucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiffs in their retail store and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased

results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as [fol. 36] to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiffs or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class and quality, at similar price, as the plaintiffs or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence plaintiffs, by reason of their operation of a larger store and the larger volume of gross sales made by it therein, have no advantage whatever over the retail mer- [fol. 37] chant operating a specialized individual store in competition with the store of these plaintiffs or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiffs' store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display win-

dows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiffs have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiffs in their various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiffs.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs and in favor of the retail merchant conducting a specialized individual store.

[fol. 38] XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The [fol. 39] practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one

hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a [fol. 40] retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the abil-

ity of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the [fol. 41] merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, [fol. 42] unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buy-

ing on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and merchandising ability as the plaintiffs and as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiffs and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of [fol. 43] taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiffs, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiffs are subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiffs and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiffs and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single

sale to have a large volume of sales and continuously to [fol. 44] increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiffs are engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiffs and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiffs and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiffs and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiffs and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

[fol. 45] XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of plaintiffs and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by plaintiffs and other retail merchants similarly situated and, as far as possible under said Act, to divert trade and custom from the retail stores of plaintiffs and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed

at rates very much lower than those exacted by said Act of plaintiffs and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in unformity in its application to the persons or occupations taxed thereunder, and it designedly transfers to and imposes upon plaintiffs and all other retail merchants similarly situated an undue proportion and prac- [fol. 46] tically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by plaintiffs and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to plaintiffs and other retail merchants similarly situated the equal protection of the law guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiffs conduct in their retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the [fol. 47] excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are entirely too

numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiffs bring this suit on their own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiffs or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiffs or any of said other retail merchants on whose behalf this suit is brought.

[fol. 48] While it is impracticable to bring them all before the Court, plaintiffs name herein some of the other retail merchants similarly situated and belonging to the class of retail merchants doing business in Kentucky, on whose behalf plaintiffs bring this suit, as follows:

Rodes-Rapier Co.

Louis Appel Co.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

[fol. 49]

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs

for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiffs state that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiffs and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiffs, to make said payments, the said defendants will attempt to enforce against them, including plaintiffs, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiffs, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiffs and other retail merchants similarly situated.

[fol. 50] XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said

challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed by Section 55, under which said Act could not and did not [fol. 51] become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiffs say that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiffs say that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates [fol. 52] the provisions of the Constitution of Kentucky as herein set forth, and plaintiffs now specially set up and claim herein the rights, benefits, privileges, immunities and exemptions secured to them by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Ken-

tucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiffs and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiffs and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiffs and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiffs and all other retail merchants similarly situated, and in that it taxes plaintiffs and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classifica-[fol. 53] tion, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act and also in that it allows to retail merchants doing business in corporate form, a remission, in whole or in part, of taxes levied under said Act, or a credit thereon, when no such remission or like or corresponding credit is allowed to plaintiffs or to other retail merchants who are not incorporated.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiffs by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiffs and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the tax-[fol. 54] payer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiffs say that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiffs say that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General

[fol. 55] Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiffs have no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiffs say that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiffs and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiffs the severe penalties provided in said Act, and also to enforce the collection from these plaintiffs of said illegal tax, in the sum of $5,449.28 as hereinbefore computed and stated, and also to compel plaintiffs, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiffs, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of these plaintiffs amounting *of* [fol. 56] $1,253,389.07, upon which, under said Act, a tax would result against these plaintiffs of $5,449.28 as hereinabove set out, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiffs and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiffs and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiffs, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiffs' and others similarly situated, and as a result thereof, plaintiffs, and others simi- [fol. 57] larly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

(3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) If plaintiffs and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiffs and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiffs and others similarly situated, do not have a plain, [fol. 58] adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the

Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiffs would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail store and needed by them to carry on their [fol. 59] business therein. The payment of so large a sum of money will impair the ability of the plaintiffs to operate their business in Kentucky and will possibly decrease the amount of annual business which they will be enabled to do, and will give competitors of the plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiffs and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal constitution-.

Prayer for Relief

Inasmuch, therefore, as the plaintiffs are without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiffs pray.

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

[fol. 60] 2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiffs and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiffs and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiffs, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiffs and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiffs, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

[fols. 61 & 62] 3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482, entitled: "An act relating to revenue and taxation, imposing an

excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,'' be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiffs.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the court, upon their verified Bill of Complaint herein showing that immediate and irreparable injury, loss or

damage will result to plaintiffs before notice upon defendants can be served and a hearing had upon their application this day made for an interlocutory injunction, to grant them a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; and declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prose-
[fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said

Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue Doolan, Helm & Helm, Solicitors for Complainants.

[fol. 66] In United States District Court

Motion for Interlocutory Injunction—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the Court, upon their verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to these plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 67] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiffs, Levy Brothers by counsel, and upon their verified Bill of Complaint herein, entered their motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of their application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiffs before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiffs' application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiffs and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

[fol. 69] (b) Any officer, director, trustee or agent of said plaintiffs and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiffs and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiffs or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiffs and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiffs a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosetion or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiffs shall give bond with good security, to be approved by this Court or the Judge thereof, in

the penal sum of -2,500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by [fol. 71] the defendants or any of them who may be found to have been wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges can not be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in

Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge. Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise", line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act", line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] In United States District Court

Motion to Dismiss—Filed February 14, 1931.

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitor for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931.

Come now the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and for answer to the Bill of Complaint filed in the above styled action plead as follows, to-wit:

I

For answer to paragraph 1 of plaintiffs' Bill of Complaint, defendants admit all the allegations therein.

[fol. 78] II

For answer to paragraph 2 of said Bill of Complaint, defendants deny that said Act is void for any reasons hereinafter set out, and admit all the other allegations contained in said paragraph.

III

For answer to paragraph 3 of said Bill of Complaint, defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum or value of $3,000, exclusive of interest and cost. They deny that this is a suit of a civil nature or that it is brought in equity for the purpose of enjoining the defendants or each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, or that it is brought for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs, or other taxpayers similarly situated, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs, or any of said retail merchants similarly

situated, or from collecting or seeking to collect from the plaintiffs, or any of said retail merchants similarly situated, any tax purporting to be levied or assessed upon the plaintiffs, or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated, for violation of any of the terms of said Act.

IV

For answer to paragraph 4 of the said Bill of Complaint, defendants admit that House Bill 111 was passed [fol. 79] at the 1930 term of the General Assembly, but deny that it was introduced, read, signed, or enrolled under the title:

"H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

And further deny that it was passed under any title except that shown by the enrolled bill in the Office of the Secretary of State, a certified copy of which bill is filed herewith.

V

For answer to paragraph 5 of said Bill of Complaint, defendants deny that said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated, or in aid of such individually owned or operated stores. They deny that while said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States, as shown by the opinion in that case.

They deny that both the nature and purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred, or that the measure as so amended and passed in the manner set out and approved by the Governor was so framed as to contain any obnoxious or any unconstitutional features.

[fol. 80] VI

For answer to paragraph 6, defendants admit the allegations contained therein.

VII

For answer to paragraph 7, they deny that in the conduct of plaintiffs' store each of said departments is operated separately, or that plaintiffs' books or accounts are kept so as to show separately as to each department the sales therein, the expense of operation, its proper proportion of rental, taxes, insurance or all or other overhead expense, or the net results of such operation of each or any department, to the end that plaintiffs may determine after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance or any or all other proper overhead charges, the result of operation in each or any such department, or the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management to make each or any department self supporting, or for any other reason.

They deny that in the conduct of its general business plaintiffs come into competition with a large or any number of other stores selling merchandise of a similar character in Louisville, or in other cities in Kentucky, or that the same is true as to each or any department operated by plaintiffs in their retail store, or that each or any of said departments is compelled to or does actively or at all compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville or elsewhere in Kentucky. They deny that such competition exists or extends to the matter of buying power or to the matter of selling or to the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in [fol. 81] Louisville or elsewhere in Kentucky, or that such

or any competition applies to plaintiffs' conduct of its store as a whole or as to each unit or any unit or department therein.

VIII

For answer to paragraph 8, defendants deny that for many years last past or any years, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky; deny that at any time the partnership has been a large taxpayer in the State of Kentucky, City of Louisville or County of Jefferson, paying all or any ad valorem taxes levied therein by competent authority for State, County or City purposes; deny that their firm has exerted itself with the utmost diligence or prudence, or at all, to build up its business as a retail merchant by all or any honorable means, or that it has built up a large or valuable business in the face of the keenest or any competition with other retail merchants conducting a similar business, or that some of them have a larger volume of gross sales, or others have a smaller volume of gross sales in the respective kind or class of merchandise sold by plaintiffs.

They deny that to do this has required of the plaintiffs the closest attention to every or any phase of their business, or careful foresight as to the class or style of goods they should stock in their store or in each department thereof to attract the public or to satisfy its wishes or to stimulate purchases by it, or the most effective methods of displaying or advertising its goods so as to attract buyers, or the most careful or any consideration as to prices to place thereon so as to stimulate sales or to obtain a turnover of its stock as rapidly as possible at all or any times, or as to such articles as are seasonal in character in order to avoid losses in business that result from carrying over old stock from one season to another, or otherwise, or at the same time giving to its buying public the benefit of at-[fol. 82] tractive goods properly priced or at the proper season for their sale or use.

Defendants deny that plaintiffs have been obliged to expend each or any year, in the community served by them, large or any amounts of money for advertising in newspapers or for trade solicitation by personal letters to their

customers, or circulars to the public generally, or have expended large or any sums of money in the employment of skilled or competent persons to decorate their show windows or to make an inviting display of merchandise in their windows or in their store, or in the purchase of the proper equipment for such purposes. They deny that by such methods or by the policy of continued fair dealing with the buying public, their firm has been able to build up its business or to take its own proper part in building up its City or State.

Defendants deny that plaintiffs have for many years or at all actively interested themselves in all or any forms of civic, cultural, religious or welfare work carried on in their City or State, or contributed largely or at all of their means or the time of their members.

They deny that plaintiff, Fred Levy, has been President of the National Association of Clothiers or Furnishers or of the Louisville Retail Merchants' Association or the Louisville Commercial Club, or of any other organizations engaged in civic, cultural, religious or welfare work, or that he has served as member of the Park Commission of the City of Louisville, or that in such capacity he has served without pay.

They deny that other members or employees of their firm have taken their part, or any part, in public activities.

Defendants deny that plaintiffs' firm keeps its money on deposit in banks located in Kentucky, or makes purchases of goods produced in Kentucky. They deny that the firm has more than one hundred and seventy-five employees at [fol. 83] all times or as high as two hundred and twenty-five during rush seasons, or that they have either of such number; deny that it pays them the highest current compensation for services of the kind rendered by them; deny that nearly all or any if its employees have been with it continuously for more than five years, or for any such time, or that most or many of them have been with it for a period ranging from ten to fifty years, or any such time; deny that any others are actually pensioned by it; deny that near the end of each calendar year or at all, it gives to any employees a bonus proportioned to services rendered; deny that any employee in its service for as much as a year gets a vacation of one week or more, or at all, on full or any pay.

IX

For answer to paragraph 9 of said Bill of Complaint, defendants say that they do not have sufficient information to answer the allegations contained in paragraph 9 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

X

For answer to paragraph 10, defendants deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiffs' method of conducting or managing same that is inimical to the public health, public welfare, public morals or the public safety, or which increases any fire or police hazard beyond whatever hazard may appertain to other stores having a similar class of merchandise with one-twentieth the annual volume of gross sales made by the plaintiff.

Defendants deny that Chapter 149, Acts 1930, is purely a tax measure or that it does not purport to be an exercise of the police powers of the State, or that it does not relate [fol. 84] to public health or public welfare or public morals or the public safety; deny that it does not attempt to regulate any business that is affected with public interest; deny that no provision is made therein for the regulation, supervision or inspection of any retail merchant upon whom or whose occupation it attempts to impose a tax.

XI

For answer to paragraph 11, defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts 1930, is not equal or uniform as applied to retail merchants therein sought to be taxed, or that the classification of retail merchants attempted to be made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to these plaintiffs or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that in its higher brackets, or at all, said tax is confiscatory as to these plaintiffs or any others similarly situated.

XII

For answer to paragraph 12 of said Bill of Complaint, defendants say they do not have sufficient information to answer the allegations contained in paragraph 12 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

XIII

Defendants deny that each or any of the separate departments conducted by plaintiffs in their retail store comes into direct competition with any specialized individual retail store in Kentucky dealing mainly or exclusively, or [fol. 85] at all, in the particular kind or class of goods handled or sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. They deny that in no one department conducted by plaintiffs do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to $400,000, or that the gross annual sales of any specialized retail store in Kentucky competing with any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceeds in any case the sum of $700,000, or that practically all or any of them have gross annual sales not exceeding $400,000 in amount.

Defendants deny that said Act of 1930 designedly or at all, by its terms works a discrimination against plaintiffs or denies to them equal protection of the law, or imposes upon them an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one department are in any case, or in every case, taxed under said Act in the lowest bracket of one-twentieth of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, or that on the other hand or at all the gross sales of plaintiffs' department competing with any specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest bracket or rates of taxation provided in said Act, to-wit, one per cent, or that said sum is twenty times in excess, or in any times in excess, of the rate

that in every case is levied upon the specialized single store competing with one of the plaintiffs' departments in their retail trade.

[fol. 86] XIV

For answer to paragraph 14, they deny that said challenged Act of 1930 contains in Section 4, or any part thereof, a provision which in effect entirely or otherwise exempts from the payment of any tax thereunder all or any smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate or any departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

They deny that Section 4, or any part of said challenged Act, provides, in substance or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, that in a case of retail merchants having a smaller volume of sales such credits are in actual fact provided as in effect, or otherwise, relieve said smaller retail merchants from the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted from them under the challenged Act.

They deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder are sufficient in any case to offset any tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or at any time, or that the allowance of such credits on the tax levied in the Act or the graduation of such tax were provided for in said Act as any part of a legislative scheme to tax retail [fol. 87] merchants having a large volume of gross annual sales, or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are few retail merchants in Kentucky whose gross annual sales in a single or individually owned store exceeds $400,000, or that the gross annual sales of practically all or any such retail merchants are below $100,000, or in most or any instances below $50,000.

They deny that in practical effect or operation only retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have gross annual sales in all of their stores or departments aggregating more than $400,000 are subject to taxation under said Act in an appreciable amount, or that those who are taxed at all constitute a small class of limited number as compared with the vast number of retail merchants, or that any retail merchants are wholly exempt under said Act. They deny that there is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act, or that any class is exempt from taxation under said Act. They deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise tax aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, or has a gross annual sales of $50,000, that it could by any pos- [fol. 88] sibility be assessed under said Act of 1930 with a tax exceeding $25; deny that as a matter of fact, in general practice it would not be assessed with any tax at all or with a smaller tax than $25, because its annual corporation license tax levied under Section 4189-1 and Section 4189-2, Kentucky Statutes, at the rate of 70c per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely or at all offset any tax imposed upon it by said Act or would thus be a substitute for any tax so imposed upon it by said Act.

They deny that on the other hand the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all or any of the other gross annual sales made in all or any of the other departments of plaintiffs' store, or would thus be subjected to a tax at the rate of one per cent as compared with a tax of one-twentieth of one per cent levied by said Act upon any retail merchant conducting an average general retail store or competing with plaintiffs in the sale, at retail, of goods of the same kind or character; deny that the credits allowed by plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to an insignificant part of the tax levied upon plaintiffs be reason of their annual gross sales in such department.

XV

For answer to paragraph 15, they deny that this Act, by its terms, or especially by Section 4, or any part thereof, designedly or at all makes or attempts to make a classification of retail merchants to be taxed thereunder on a basis of whether such retail merchants are incorporated or unincorporated, or to allow to retail merchants that conduct their business in corporate form a credit upon any taxes [fol. 89] otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in corporate form; deny that at the same time said Act denies to plaintiffs or other retail merchants similarly situated who are not incorporated, equal or corresponding credit upon the taxes levied or assessed against them by the terms of said Act.

They deny that there are many or any retail merchants conducting retail stores in Kentucky who are incorporated or thus entitled under Section 4 of said Act, or any part thereof, to a credit upon any license taxes imposed upon them by said Act, or that this credit in any case amounts to a complete or any remission of any taxes levied upon them under said Act, or that in any other case said credit amounts to a substantial remission of any taxes levied upon the incorporated retail merchant under said Act,

when at the same time these plaintiffs or other retail merchants similarly situated who are not incorporated, must pay the taxes thereby levied upon or assessed against them without equal or corresponding deduction.

They deny that such classification of retail merchants as incorporated or unincorporated or that such imposition upon them of different rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, is based upon such classification, or that any of them is unreasonable, arbitrary, capricious, unequal, unjust, oppressive or discriminatory against these plaintiffs or any other retail merchants similarly situated who do not conduct their business in corporate form, or that said Act in such respect denies to these plaintiffs or to other retail [fol. 90] merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

They deny that by reason of the facts set out in this clause, or in any other clause of this bill, said Act is unconstitutional, null or void.

XVI

For answer to paragraph 16, they deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments, as defined in said Act, to ag-regate for the purpose of taxation, or otherwise, the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separated or distinct enterprises, without regard to their location, or without regard to the fact that said stores or departments are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is thereby to tax, penalize or because of increased rate of taxation in the higher brackets, to prohibit employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which

may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores under one management or co-operatively under an association of management.

[fol. 91] XVII

For answer to paragraph 17, they deny that for many years past, or at all, there have been many or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording to so-called individual or single store retail merchants engaged in Kentucky or elsewhere, in the business of selling at retail goods, wares, merchandise of the character handled or sold by plaintiffs in their retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky or elsewhere, corresponding in any material respect as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or agencies for any fee, afford to retail merchants operating individual specialized stores throughout Kentucky, or elsewhere, affiliated with them, any of the facilities or advantages in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or that in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines.

They deny that such co-operative associations or agenices afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in the advertising of goods of such retail merchants to the buying public, or any advice or suggestions as to the most approved or advanced method of selecting goods of the proper style [fol. 92] or qaulity, or for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

They deny that many, or any, retail merchants owning or operating in Kentucky specialized individual retail stores,

who have gross annual sales aggregating as much as $100,000, for some years past, or at any time, as a part of the economic development of the business of a retail merchant, or otherwise, have availed themselves of the services or facilities thus afforded by said co-operative associations or agencies; deny that such retail merchants have as great buying power as plaintiffs or other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, or that they can buy goods of as high class or quality, at similar price as plaintiffs or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or that in any case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

They deny that plaintiffs, by reason of their operation of a larger store or the larger volume of gross sales made by it therein, have no advantage over the retail merchant operating a specialized individual store in competition with the store of these plaintiffs or any department therein, or that on the contrary many of said specialized individual stores have gross annual sales of merchandise handled by them exceding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiffs' store competing with such specialized retail merchant.

[fol. 93] They deny that the specialized individual merchant has advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located, or that any of said specialized individual retail stores competing with plaintiffs have, by reason of their advantage, or otherwise, made any inroads or encroachments on the trade of plaintiffs in their various departments established or conducted for many years prior to the establishment of such specialized individual stores now operating in competition with plaintiffs.

They deny that there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs or in favor of the retail mer-

chant conducting a specialized individual store, or that there is any such discrimination.

XVIII

For answer to paragraph 18, defendants deny that the classification made as a basis of the tax imposed by said Act rests wholly, or at all, upon gross retail sales, or that the percentage of said tax is increased with each $100,000 of sales above $400,000, unequaully, disproportionately, arbitrarily or with design or intent to burden, oppress, prohibit or discriminate against the ownership of any retail store in Kentucky having a large volume of gross sales whether in one store or more or in one department or more in the same store, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above $400,000. Defendants deny that the practical operation or effect of said increase in the [fol. 94] percentage of tax per $100,000 of increased sales is unequal or disproportionate, or that the effect of same is that a retail merchant who increases his sales $100,000 above $400,000 pays as much tax on said $100,000 as a retail merchant whose sales are $200,000, or that for the next $100,000 increase said merchant is required to pay an additional $250, or that for the next $100,000 increase an additional $400, or a greater tax on said $100,000 of increased sales than the entire tax of retail merchant whose total sales are $500,000, or that for the next $100,000 of sales $550, or that said tax on said $100,000 of sales is as great as the total tax of a retail merchant having total sales of $600,000, or that for the next $100,000 of sales the tax is $700, or that for the next $100,000 the tax is $850, or that for the next $100,000 of sales or for every $100,000 of sales thereafter, a tax is assessed of $1,000, or that same is a greater tax per $100,000 of sales than the total tax required of a merchant whose sales are $700,000. They deny that under said Act a retail merchant having gross sales not exceeding $300,000 who increases his said sales by $100,000 is only liable to a maximum increase in taxation of $50, less his permitted credits, or that the plaintiff is subject to a tax of $1,000 on every $100,000 increase in

sales; deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph 19, defendants deny that the classification or graduation made as a basis for the tax imposed rests upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management; deny that said classification does not rest upon the ability of the taxpayer to pay said tax; that it does not rest upon the in- [fol. 95] come or earnings from any store or stores; that it *or* has no necessary relation to receipts; deny, that it is imposed without regard to whether said sales are made at a profit or loss or the amount of profit or loss therefrom; deny it has no relation to profits or losses; deny that it has no relation to the capital employed or invested; deny that it does not take into account the type of business; that it does not make any provision for the merchandise returned or for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, or that the classification is solely as to the gross amount thereof by dollars or that it strikes at the increase in said gross sales by geometrical increase in the rate of taxation per $100,000 up to $1,000,000.

Defendants deny that said Act taxes the dollars of sales of certain retail merchants upon a rate or basis different from the dollars of sales of other merchants engaged in direct competition or similar circumstances, or imposes upon a merchant having gross sales of $800,000 a tax of $1,500 or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to wit; $400,000, or who is only subject to a tax of $200.

They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times as much tax or any times as much tax on his dollar of sales as his competitor who is similarly situated is required to pay on his dollar of sales; deny that said

classification is unreasonable, without a rational basis or is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph 20, defendants deny that any competitive stores, by reason of connection with co-opera-
[fol. 96] tive associations, agencies or organizations, although similarly or individually owned, enjoy any of the advantages which flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays, or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combine co-opertively as great or greater number of stores or have as great or greater purchasing power or buying power, or have as great or greater advertising or merchandising ability as the plaintiffs or as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that said singly or individually owned stores or members of co-operative associations are similarly circumstanced or are in direct competition with plaintiffs or other retail merchants owning two or more stores, or that said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as plaintiffs, or are, in practical operation and effect, exempt from any taxation under said Act, or that the plaintiffs are subject to taxation at the highest rate prescribed in said Act, or that such competitive stores are given undue or unfair economic advantages over retail stores of the plaintiffs or other retail merchants similarly situated or are in effect aided, helped or subsidized by said Act in their competition with plaintiffs or other retail merchants similarly situated.

XXI

For answer to paragraph 21, defendants deny that the efficient or successful method of conducting retail business
[fol. 97] in the Commonwealth of Kentucky, or elsewhere

in the United States, at the present time or any other time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital; deny that the retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales or continuously to increase the volume in order to secure a fair return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which plaintiffs are engaged, or any other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith; deny that in conformity therewith plaintiffs, or any other retail merchants similarly situated, have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales; deny that plaintiffs, or any other retail merchants similarly situated, are dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business; deny that such merchandising methods are the basis of the business of plaintiffs or any other retail merchants similarly situated or are of benefit to the public of the Commonwealth of Kentucky, or have brought to plaintiffs, or any other merchants similarly situated, a large or valuable good will or a large sales volume.

[fol. 98] XXII

For answer to paragraph 22, defendants deny that the rates of taxation exacted by said Act are unfair, unjust, unequal, oppressive or discriminatory, or that such rates imposed upon plaintiffs or any other retail merchants similarly situated, imposed upon them an unjust or intolerable burden, or any burden, for the benefit of other retail merchants engaged in like business having a smaller volume of annual gross sales, or that the purpose of such Act is to destroy or impair the good will or established trade or

business, or to reduce the volume of annual gross sales made by plaintiffs or other retail merchants similarly situated, or to divert trade or custom from retail stores of plaintiffs or other retail merchants similarly situated who are taxed in the higher brackets of taxation, to the retail merchants who have smaller annual gross sales or who are taxed under said Act at rates lower than those exacted by said Act of plaintiffs or other retail merchants similarly situated.

They deny that said Act, in its purpose or effect, is lacking in conformity in its application to the persons or occupations taxed thereunder, or that it transfers to or imposes upon plaintiffs or any other retail merchants similarly situated, an undue proportion or the entire burden of the license taxes attempted in said Act to be levied upon retail merchants.

They deny that said Act discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or against any retail merchants, or that it levies a subsidy to be paid in any part by the plaintiffs, or other retail merchants similarly situated, who have annual gross sales in larger volume; deny that said Act denies to plaintiffs, or any other retail merchants similarly situated, the equal protection of the laws guaranteed to it or to them by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States [fol. 99] or by the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph 23, they deny that there is a large number, or any number, of retail merchants lawfully engaged in Kentucky in the operation of one store either with or without separate departments therein such as plaintiffs conduct in their retail stores, or in the operation of two or more stores either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that under said Act each of them is subject to taxation in the higher brackets, or that the rates

of taxation therein levied upon them by reason of the large volume of gross annual sales made by them is excessive, unjust or discriminatory, or that a large number of retail merchants are competing with them, or that such large or any number of retail merchants by reason of credits allowed under Section 4 of said Act are required to pay no tax or insignificant amount of tax.

They deny that the retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are too numerous to be joined in this suit as parties plaintiff, or that the matters or things complained of in this bill or the questions herein raised as to the legality of the tax complained of, are all, or any, questions of common or general interest to any persons, or that such persons constitute a class so numerous as to make it impracticable to bring them all before the Court herein, or that this suit is brought on behalf of others besides plaintiffs, namely, Rodes Rapier Co. and Louis Appel Co.

[fol. 100] XXIV

For answer to paragraph 24 of said Bill of Complaint, defendants admit the allegations contained therein.

XXV

For answer to paragraph 25 of said Bill of Complaint, defendants admit that they are preparing for the administration and enforcement of said Act, but deny that they will attempt to enforce any drastic penalties against plaintiffs or others similarly situated, or that any irreparable injury or damage, or any injury or damage, would result to plaintiffs, or other retail merchants similarly situated.

XXVI

For answer to paragraph 26, they deny that Section 13, being the emergency clause of said Act, is void in that such emergency thereto cited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, or under the decision of the Kentucky Court of Appeals in McIntyre vs. Commonwealth, 221 Ky. 16, or any other decision by the same Court, or that no reason meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said

Act take effect upon its approval by the Governor on March 17, 1930, instead of according to it the constitutional method or time prescribed by Section 55, or that said Act did not become effective prior to June 17, 1930.

They deny that the reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance or development of the State Government or its agencies; deny that neither of the purposes is related to or connected with the maintenance or development of the [fol. 101] State Government or its agencies which are referred to in Section 13 of said Act as a reason for the latest emergency therein declared, or that said Act could not take effect under Section 55 of the Kentucky Constitution prior to June 17, 1930.

XXVII

For answer to paragraph 27, defendants deny that said Act in the various particulars hereinbefore set out is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates provisions of the Constitution of Kentucky as herein set forth, or for any reason.

(1) They deny that for the reason hereinbefore set forth, said Act is void in several particulars or respects hereinbefore pointed out.

(a) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law as an arbitrary exaction insofar as any tax levied thereunder is measured by gross sales of retail merchandise made prior to June 17, 1930.

(b) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, equal protection of the laws in that it exacts of the plaintiffs, or any other merchants similarly situated, an unjust, unreasonable, discriminatory, oppressive or prohibitive rate of taxation, or that it is based upon a classification as unreasonable, unjust or discriminatory against the plaintiffs, or any other retail

merchants similarly situated, or that it taxes plaintiffs, or any other retail merchants similarly situated at geometrically increased rates, graduated according to increased [fol. 102] volume of gross sales without reference to any other consideration whatever or without a reasonable basis of classification, or that it at the same time imposes upon other retail merchants doing the same kind of business in substantially the same way, any lower rate or burden of taxation, or as to any number of such retail merchants at all, exempts them from taxation under said Act, or that it allows to retail merchants doing business in corporate form a remission, in any part, of taxes levied under said Act, or a credit thereon, or that no such remission or like or corresponding credit is allowed to plaintiffs or other retail merchants who are not incorporated.

(c) They deny that for the reason hereinbefore set forth said Act abridges the privileges or immunities guaranteed to plaintiffs by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph 28, they deny that Section 10 of said Act contains any provisions designed to deny to plaintiffs or other retail merchants attempted to be taxed under said Act, a remedy in advance of the payment of said tax, or likewise to deny a remedy after the payment of the tax imposed thereunder except that where the tax is paid under protest, the taxpayer may within two years after such payment bring in a court of competent jurisdiction in the Commonwealth of Kentucky, an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount [fol. 103] of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

They deny that such action could only be brought where the tax is paid under protest and after the payment, or that

it could only be brought or prosecuted in the courts of Kentucky, or that a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the general fund of the State in the hands of the State Treasurer, to be paid as and when funds were available for the payment of such warrant in the usual and orderly course, or that such taxes collected under said Act do not go into the general fund of the Commonwealth, or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding any State warrants drawn by the Auditor of Public Accounts upon the general fund in the hands of the State Treasurer which have been outstanding since June, 1927, or any time, or that they can not be collected by the owners or holders thereof for lack of funds in the State Treasury during such period for the payment of such warrants.

They deny that as of January 1, 1931, the money in the General Fund of the State Treasury in the office of the State Treasurer was $12,5[illegible]81, or that at that time there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts and presented for payment to the State Treasurer, but were not paid for lack of funds.

XXIX

For answer to paragraph 29 of said Bill of Complaint, defendants admit that they will enforce said Act, but deny that such act is illegal, and say that they do not have sufficient information to answer the allegations contained in paragraph 29 as to the amount of the tax owed by plain-
[fol. 104] tiffs, and therefore neither admit nor deny the same, but require strict proof thereof.

They deny that by reason of the facts herein set forth plaintiffs have no remedy in the State courts of Kentucky, or no remedy at law in the courts of the United States, or that there are no available funds to refund said tax in the event of a judgment in the State Court commanding such refund.

XXX

Defendants for answer to paragraph 30 deny that unless they are enjoined or restricted from enforcing or attempting to enforce said Act, plaintiffs or any others similarly situated will sustain irreparable loss, or any, loss for which

they have no plain, adequate or complete remedy at law, or any remedy at all in the courts of Kentucky in any of the following particulars.

(1) They deny that plaintiffs or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional method or for which they are not legally liable.

(2) They deny that upon failure of the plaintiffs, or others similarly situated, to pay said taxes, that the enforcement or attempted enforcement of penalties provided by said Act against plaintiffs, or others similarly situated, will result in plaintiffs, or others, being compelled to defend innumerable prosecutions or any prosecutions brought to recover said taxes or penalties or criminal proceedings brought to impose criminal penalties provided in Section 7 of said Act, or at great or any expense to it or them.

(3) Defendants deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out provisions of said Act to the irreparable injury or damage of the plaintiffs or any injury or damage of [fol. 105] plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) Defendants deny that if plaintiffs or others similarly situated should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they will be put to large or any expense for attorneys' fees or court costs, or will be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiffs of said sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs or other expenses, or that plaintiffs or others will be required to expend any such sum. They deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States, or that in consequence thereof plaintiffs, or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

They deny that the only remedy afforded by said Act, or by any laws of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that same appears from Section 10 of said Act of 1930, or from Section 162, Kentucky Statutes, or that these are the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented to be sued itself or through any of [fol. 106] its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) They deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) They deny that the amount of said annual tax which plaintiffs will be required to pay under terms of said Act will be a substantial portion, or any portion, of the capital invested by them in their retail stores or needed by them to carry on their business therein. They deny that the payment of such sum of money will impair the ability of the plaintiffs to operate their business in Kentucky, or will at all decrease the amount of annual business which they will be enabled to do, or will give competitors of plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, any unfair or undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, or that the same is true as to any other retail merchant similarly situated.

(8) They deny that the enforcement of said Act will have the effect of injuring or impairing any lawful business in which the plaintiffs or others similarly situated are engaged, or in which they have the undoubted right to engage, or which right is guaranteed or protected by the State or Federal Constitution.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted. [fol. 107] For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said Act, rests on the volume of gross retail sales and also upon ability of those affected by the various graduation- of said act to pay the tax at the rate levied, it being a well recognized law of merchandizing that the percentage of income of capital invested increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —%, while individual merchants competing with plaintiffs, and those similarly situated, having gross annual sales of less than $400,000.00 earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital, based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiffs, Levy Bros., and other- similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances

[fol. 108] have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of said tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiffs, and those similarly situated and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.

(c) As volume increases, expenses decrease.

(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying [fol. 109] the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small precentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year,

and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated, by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business who are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

[fol. 110] 9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed March 23, 1932

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant.
Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen., Ky., Solicitors for Appellees.
H. W. Batson, J. Whitcomb Welch, Leslie W. Morris.

[fol. 112] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harmon Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E.Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,
L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites.

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 113] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burre and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 114] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A [fol. 115] decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will

not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the [fol. 116] Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver — the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 117] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy

provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff [fol. 118] that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, [fol. 119] and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the

General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 120] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable,

and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized by a State statute, we can not presume that the [fol. 121] Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no neces-

sity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 122] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 123] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 124] ORDER AND DECREE—Entered by Judge Chas. I. Dawson et al. December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and The J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiffs' motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiffs' said motion for an interlocutory injunction herein is hereby denied, to which the plaintiffs except.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to

dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiffs for the reasons set forth in their said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiffs a permanent injunction or [fol. 125] any injunctive or other relief prayed by them.

It is therefore adjudged and decreed that the plaintiffs' bill herein be dismissed, and that the defendants recover of the plaintiffs their costs herein expended: to all of which the plaintiffs except.

The plaintiffs having this day stated in Court their intention to appeal from this Order and Decree, denying plaintiffs' motion for an interlocutory injunction, and denying their application for a permanent injunction, and dismissing their bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiffs, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of plaintiffs' said appeal, to all of which defendants except and object; Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiffs, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer,

[fol. 126] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiffs or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiffs herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fol. 127] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—January 7, 1932

This day came the parties in the above-styled three causes, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed, in compliance with the order and decree of this court entered herein December 9, 1931, conditioned as therein provided, to secure the Commonwealth of Kentucky on account of its claims for taxes for the years 1930 and 1931, together with interest, court costs and all other proper charges that may accrue thereon against the following named taxpayers respectively:

The Stewart Dry Goods Company,
Levy Bros.,
J. C. Penney Company,
Kaufman Straus Company,

H. P. Selman & Company,
Montgomery Ward & Co., Incorporated;
Herman Straus & Sons Company, Inc.;
J. Bacon & Sons,
John C. Lewis Company, Inc.;
Central Furniture Company,
Byck Bros. & Co., Inc.;
Ewing-Von Allmen Dairy Company, Inc. (Successors to D. H. Ewing's Sons);
Hook Drug Company, Inc.;
S. M. Goldberg Operating Co.,
Ben Snyder, Inc.

Said bonds with their respective sureties and/or securities deposited and pledged thereon are hereby accepted and approved as a compliance with the order and decree of this Court above-mentioned.

Chas. I. Dawson, Judge.

[fol. 128] In United States District Court

Stipulation re Substitution—Filed March 1, 1932

This day, came the parties herein, by counsel, and stipulated that J. Dan Talbot, a citizen and resident of the Western District of Kentucky, was duly elected Auditor of Public Accounts of the Commonwealth of Kentucky at the November election in 1931; that the term of office of Clell Coleman as Auditor of Public Accounts expired on January 4, 1932, whereupon the said Coleman left said office and the said J. Dan Talbot, on said date, duly qualified and took the oath of office as Auditor of Public Accounts of the Commonwealth of Kentucky, succeeding said Coleman, and is now the duly qualified Auditor of Public Accounts of the Commonwealth of Kentucky.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Counsel for Plaintiff. S. H. Brown, Counsel for Defendants.

[fol. 129] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING AUDITOR OF PUBLIC ACCOUNTS, ETC.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is herby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 130] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 1, 1932

The plaintiffs, Fred Levy et al., conceiving themselves aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of these plaintiffs, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed in the motion of plaintiffs for such interlocutory injunction, hereby appeal to the Supreme Court of the United States from said order and decree denying their motion for an interlocutory injunction as prayed therein.

The plaintiffs, further conceiving themselves aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss these

plaintiffs' bill of complaint and directs the dismissal of said bill of complaint and denies to these plaintiffs a permanent injunction or any injunctive or other relief prayed by them and adjudges that plaintiffs' said bill of complaint be dismissed and that the defendants recover of plaintiffs their costs in this cause expended, hereby appeal to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to these plaintiffs a permanent injunction, or any injunctive or other relief prayed by them, and decrees that their said bill of complaint be dismissed and that the defendants recover of these plaintiffs their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein [fol. 131] designated of said order and decree herein appealed from.

Plaintiffs pray that their said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered to be duly authenticated and sent to the Supreme Court of the United States.

Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy, and S. L. Greenebaum, Partners, Trading and Doing Business under the Firm Name of Levy Bros., by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

[fol. 132] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 1, 1932

The plaintiffs herein jointly and severally, by their counsel, respectfully represent that in the records and proceed-

ings had in the above-entitled cause, and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiffs jointly and ssverally make the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiffs' motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiffs' bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill as unconstitutional and hereinafter, for brevity, referred to as the challenged Act, affords to the plaintiffs a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to plaintiffs by any provision of Kentucky law is plain of adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiffs.

[fol. 133] (3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiffs in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the

amount of any illegal tax exacted of plaintiffs, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its Auditor of Public Accounts as its representative, that might be brought by plaintiffs in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts as its representative, might be sued at law in any court of the United States in an action by plaintiffs for the recovery of illegal taxes exacted of them under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest [fol. 134] thereon, might be recovered in any action in any court of the United States, or in any other court except a court of competent jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky, against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiffs under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

(10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreason-

able delay would be encountered by plaintiffs in obtaining a refund or a recovery of illegal taxes exacted of plaintiffs under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when [fol. 135] presented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiffs in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-*618*, to the effect that it is the duty of the Treasurer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

(14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiffs any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and to the prompt administration thereof, as the [fol. 136] remedy in equity herein sought by plaintiffs.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiffs.

(16) The Court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiffs on taxes illegally exacted of them under the challenged Act.

(17) The Court erred in holding that plaintiffs, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to them pursuant to any such judgment, can legally or equitably be required, upon the non-payment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

(18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiffs under said Act in successive years during the pendency of suits testing the validity of such Act.

[fol. 137] (19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiffs pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of themselves and a numerous class of other retail merchants similarly situated, more than forty of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the constitutionality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims

herein asserted by plaintiffs on their own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law by plaintiffs and numerous other retail merchants similarly situated, as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiffs' Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S. 613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

[fol. 138] (2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act designedly denies to plaintiffs and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiffs and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiffs at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and

therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against these plaintiffs in the matter of taxation upon their gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiffs the equal protection of the laws guaranteed to them by the Equal protection Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 139] (4) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification prescribed by the challenged Act, through deductions or credits allowed in Section 4 thereof, is arbitrary and unreasonable and is unjustly discriminatory against the plaintiffs and denies to them the equal protection of the law in that such classification allows to other retail merchants who do business in corporate form a credit or deduction for corporation license taxes paid by them, without allowing to plaintiffs any such credits or deductions or any compensating or corresponding credits or deductions.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiff's motion for an interlocutory injunction, that the challenged Act, in its actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiffs, while at the same time levying upon plaintiffs, with their larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(6) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiffs the equal protection of the law in that, in practical effect, it operates to impose upon plaintiffs a grossly excessive and disporportionate burden of the taxes levied [fol. 140] under said Act, merely because of the larger volume of plaintiffs' gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, competitors of the plaintiffs engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act unjustly and unreasonably discriminates against plaintiffs and other retail merchants similarly situated, because, in its actual operation and effect, said challenged Act exempts from its burdens a vast number of competing retail merchants doing business in Kentucky in that these plaintiffs, upon their gross retail sales, which aggregate for the taxable portion of the year 1930 $1,253,389.07, are subjected by said Act to a tax of $5,583.89 less a possible disputed credit of $134.61 for automobile license taxes, or a minimum tax exacted of these plaintiffs amounting to $5,449.28, while at the same time, out of approximately 25,000 retail stores competing with these plaintiffs, doing business in Kentucky and having an annual volume of gross retail sales in Kentucky approximating $535,000,000.00, nearly one-third of them are wholly exempted from any tax whatever, and, as shown by the evidence at the hearing of actual returns made to the State Tax Commission, 16,353 retail merchants competing with these plaintiffs, who have reported for the taxable period of the year 1930 gross sales aggregating $247,923,309.00, actually pay in taxes, in the aggregate, only $63,096.56 or less than $3.80 each on the average.

[fol. 141] (8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky, in that said

Act, in each of the particulars specified in assignments (1) to (7), both inclusive, under this hearing II, captioned "Additional Assignments of Errors Committed by the Court in its Interlocutory Decree Demying Plaintiffs' Motion for an Interlocutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

(9) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that as to taxes claimed of Plaintiffs on account of sales made in the period between March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of these plaintiffs under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respect said challenged Act denies to these plaintiffs the guaranty and protection of due process of law afforded to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiffs pray that [fol. 142] each of said decrees herein appealed from, namely, the interlocutory decree and the final decree as hereinbefore set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiffs' bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

[fol. 143] In United States District Court

Order Allowing Appeal—March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for ap-

peals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages, re-
[fol. 144] quired herein, shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 145-149] Bond on appeal for $1,000.00 omitted in printing.

[fols. 150 & 151] Citation, in usual form, showing service on John B. Lewis et al., omitted in printing.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed March 23, 1932

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. Bill of complaint.

2. Order permitting plaintiff to sue on behalf of all others similarly situated, pursuant to Equity Rule 38.

3. Motion for temporary restraining order.

4. Motion for interlocutory injunction.

5. Temporary restraining order.

6. Order noting appearance of defendants entered by S. H. Brown, Assistant Attorney General, and filing notice required by Statute to be given to Governor, Attorney General and defendants herein, duly acknowledged, and

7. Agreed order that this case be heard with numbers 609 and 611 simultaneously with similar motion in case of Kroger Grocery and Baking Company v. John B. Lewis, et al.

[fol. 153] 8. Motion of defendants to strike certain allegations of plaintiff's bill of complaint.

9. Motion of defendants to dismiss plaintiff's bill of complaint.

10. Answer of defendants.

11. Stipulation (filed herewith) that same evidence read in the case of Stewart Dry Goods Company v. John B.

Lewis, et al., upon the motion for interlocutory injunction was read in this case and that said evidence reduced to narrative form and printed in the said Stewart Dry Goods Company record may be read in this case.

12. Order reading affidavits and other evidence and submitting the case.

13. Opinion of the Court.

14. Order and decree denying interlocutory injunction, and dismissing bill of complaint and continuing temporary restraining order in effect pending appeal upon the giving of bond, entered on December 9th, 1931.

15. Order filing and approving bonds entered January 7th, 1931.

16. Stipulation of parties noting J. Dan Talbott as Auditor of Public Accounts succeeding the defendant, Clell Coleman.

17. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

18. Petition for appeal.

19. Assignment of errors.

20. Order allowing appeal.

21. Appeal bond.

[fol. 154] 22. Citation and endorsement of accepted service thereon.

23. This stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 156] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS—
Filed April 9, 1932

Appellants seek the reversal of two distinct portions of the order and decree appealed from, namely:

(1) The order dismissing their Bill of Complaint upon the ground that they have an adequate remedy at law.

(2) The order denying their motion for an interlocutory injunction on the same ground.

The points relied on are stated separately and serially under the following headings:

I

Dismissal of Bill of Complaint

Federal jurisdiction clearly exists, and in the Federal Court this cause is essentially one of equitable jurisdiction, for the following reasons:

(1) The appellants are wholly without a remedy at law that is plain or adequate or complete within the meaning of Section 267, Judicial Code (now U. S. Code, Title 28, § 384), as expounded by judicial decisions.

[fol. 157] (2) There is no remedy whatever at law available to appellants in the Federal Court.

(3) The Commonwealth of Kentucky has not waived its immunity from suit in any court. It has not consented to be sued, directly or indirectly, in any Federal Court, or waived immunity from suit therein.

(4) No money judgment for the recovery of taxes illegally exacted of appellants under the challenged Act can be recovered against the Commonwealth of Kentucky or any representative of it in any action brought pursuant to the terms of the challenged Act or any other law of Kentucky. The only remedy provided in such case, by any law of Kentucky, is a proceeding against the Auditor of Public Accounts by way of mandamus to compel him to draw his warrant upon the Treasurer in favor of appellants for the

amount of appellants' claim when ascertained. No action by appellants for any such remedy or relief can be maintained at law in any Federal Court, and the laws of Kentucky restrict to its own courts any such remedy afforded thereby.

(5) Any such warrant upon the Treasurer eventually issued or delivered to appellants under any proceedings at law by them in either State or Federal Court is without right of priority in payment over any other warrants and is restricted to payment out of any moneys remaining in the General Fund after warrants against such Fund previously issued or preferentially handled by the Treasurer shall have been paid.

The taxes illegally exacted of appellants do not go into the General Fund at all, but are exclusively appropriated to other purposes. The General Fund of the State is not augmented thereby.

(6) Claims upon the General Fund are several years in arrears in the matter of payment; consequently any such [fol. 158] remedy at law provided by the challenged Act or by any other Kentucky statute is wholly inadequate. In order for the holder of any such warrants to realize anything on account thereof, it is necessary to hawk them about in an effort to find a purchaser, and to sell them at a substantial discount if a purchaser can be found.

(7) This suit is a class suit brought pursuant to Federal Equity Rule No. 38, as shown by the Court's order entered of record when this suit was brought. It is properly brought in equity to avoid a multiplicity of actions because of its common or general interest to a large number of taxpayers in the same situation as appellants, and also because an overwhelming number of actions by separate taxpayers for successive years would otherwise result. Moreover, equity jurisdiction exists because of the drastic penalties provided by the challenged Act.

II

Denial of Interlocutory Injunction

The points stated under heading I are likewise relied upon under this heading II. For the sake of brevity they are not here repeated.

In addition thereto, appellants rely upon the following points in support of their appeal from the order denying their motion for an interlocutory injunction.

(1) The court below should have granted an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided in due course upon its merits. (Assignments of Errors II—I.)

(2) The challenged Act designedly denies to appellants and to other retail merchants similarly situated the equal [fol. 159] protection of the laws, by reason of its classifications prescribed in Section 2 thereof, and by reason of its exemptions and credits or deductions provided in Section 4 thereof, and by reason of the consequent widely varying rates of taxation imposed thereby, all of which clearly and designedly effect an unjust, unreasonable and arbitrary discrimination against appellants and other retail merchants having a large volume of annual gross retail sales, in favor of retail merchants who have a smaller volume of gross annual retail sales. (Assignments of Errors II—2, 3, 4, 5, 6.)

(3) The classifications prescribed in Section 2 of the challenged Act, and the exemptions and credits or deductions prescribed in Section 4 thereof, do not rest upon any reasonable basis or have any reasonable relation to the subject-matter of the Act, and they were prescribed for the express purpose of discriminating unjustly and unreasonably against appellants and other taxpayers similarly situated and denying to them the equal protection of the laws. (Assignments of Errors II—2, 3, 4, 5, 6.)

(4) The challenged Act is void under the Constitution of Kentucky in that it violates the fundamental principles of uniformity therein prescribed, which require that classification in the matter of taxation levied upon occupations, persons or property must rest upon some reasonable basis. (Assignments of Errors II—7.)

(5) The challenged Act is void under Section 55 of the Constitution of Kentucky insofar as it seeks to levy upon appellants taxes on account of sales made by them in the period between March 17, 1930, and June 17, 1930, because under Section 55 of the Kentucky Constitution the chal-

lenged Act could not and did not properly become operative or effective for any purpose until June 17, 1930.

In this respect, the challenged Act also violates the Due [fols. 160 & 161] Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Errors II—8.)

III

A more detailed statement of the points above digested and relied upon is contained in the Assignments of Errors, to which reference is made for further particulars.

Robert S. Marx, Cincinnati, O.; Frank E. Wood, Cincinnati, O.; Harry Kasfir, Cincinnati, O.; John C. Doolan, Louisville, Ky.; James W. Stites, Louisville, Ky., Solicitors for Appellants.

Service of a copy of the above list of points to be relied upon by Appellants in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fols. 162 & 163] In Supreme Court of the United States

Statement of Portion of Record to be Printed by Clerk

Appellants by counsel state that the entire record as filed on appeal herein is, in appellants' opinion, necessary for the consideration thereof. The Clerk is accordingly

directed to print the entire record in the manner prescribed by paragraph 9 of Rule 13.

Robert S. Marx, Frank E. Wood, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors for Appellants.

Service of notice of the above direction to the Clerk in the matter of printing the record on appeal is hereby acknowledged on behalf of the Appellees.

Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 164] [File endorsement omitted.]

Endorsed on cover: File No. 36,643. W. Kentucky D. C. U. S. Term No. 28. Fred Levy et al., appellants, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,643.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 29

J. C. PENNEY COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

(36,644)

(36,644)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 29

J. C. PENNEY COMPANY, APPELLANT,

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JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

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[fol. 1] [Caption omitted]

[fols. 2 & 3]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

J. C. PENNEY COMPANY, a Delaware Corporation, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, and HENRY M. CLINE, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Jan. 24, 1931.

The plaintiff, J. C. Penney Company, a corporation organized under the laws of the State of Delaware, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

[fol. 4] I

The plaintiff, J. C. Penney Company, is now and at all times herein mentioned it was a corporation duly created, organized and existing under the laws of the State of Delaware, with its principal office and place of business for the State of Delaware in the city of Wilmington, in the State of Delaware, and it is a citizen and a resident of the State of Delaware.

It is authorized to do and it is doing business in the Commonwealth of Kentucky, and since commencing to do business in Kentucky it has continuously complied with all the laws of the Commonwealth of Kentucky relating to foreign corporations authorized to do business therein, and particularly with the requirements of Section 571, Kentucky Statutes, relating to the manner in which foreign

corporations are required to qualify themselves to do business in the Commonwealth of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax [fol. 5] laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascer- [fol. 6] taining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State

Tax Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

The controversy in this suit is wholly between citizens of different States, to wit, between the plaintiff, which is a citizen of the State of Delaware, and the defendants named in the foregoing caption to this bill, who are all citizens and residents of the Commonwealth or State of Kentucky.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of [fol. 7] them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

Plaintiff charges that said Act is unconstitutional, null and void because, in the respects hereinafter stated, it is violative of the various provisions of the Constitution of the United States and of the Fourteenth Amendment thereto, hereinafter more specifically set forth, and also [fol. 8] violative of various provisions of the Kentucky Constitution, likewise hereinafter set forth.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day [fol. 9] of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth,

said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its pas- [fol. 10] sage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 11] V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose, of said House Bill 111 was changed by amendment by the Committee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

[fol. 12] VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-

partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with [fol. 13] others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross

sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under [fol. 14] the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

[fol. 15] "§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be

enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined [fol. 16] herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting

the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, [fol. 17] or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the pro-

visions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent im- [fol. 18] provements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the

courts shall not affect or impair the remaining provisions [fol. 19] of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

Throughout the calendar year 1930, this plaintiff has been engaged in conducting 21 retail stores, one of which has been operated since March 21, 1930, in 21 different cities or towns hereinafter mentioned, in the Commonwealth of Kentucky, where plaintiff sells exclusively at retail Dry Goods, Shoes, Clothing, Notions, Piece Goods, and similar articles of merchandise usually handled in stores of the same general character and hereinafter more specifically set forth in connection with a statement as to the merchandise handled in the several departments into which each of its stores is divided.

[fol. 20] It sells exclusively at retail and exclusively for cash—extending no credit—in each of its stores in Kentucky, which are located in the cities or towns hereinafter mentioned, namely:

Maysville,	Mayfield,	Frankfort,
Paducah,	Owensboro,	Hopkinsville,
Richmond,	Bowling Green,	Winchester,
Middlesboro,	Paris,	Henderson,
Madisonville,	Princeton,	Georgetown,
Glasgow,	Lancaster,	Central City,
Mount Sterling,	Lexington,	Corbin.

Gross sales made by plaintiff in said retail stores respectively during the calendar year 1930 and during the period

of said calendar year beginning March 17th and ending December 31st, both dates inclusive, are as follows:

[fol. 21]

Store number.	Gross sales calendar year 1930	Gross sales March 17 to December 31, 1930
1	$104,586.62	$81,782.61
2	114,666.90	93,598.00
3	101,583.71	84,008.18
4	312,449.10	262,149.56
5	244,892.55	198,856.14
6	111,537.69	88,842.16
7	165,120.03	133,643.96
8	129,039.14	108,590.68
9	129,968.63	107,280.25
10	59,920.58	49,457 63
11	89,879.43	72,875.37
12	66,549.75	55,774.04
13	66,228.17	55,819.40
14	59,092.10	48,887.79
15	59,514.91	48,465.65
16	79,206.38	65,854.21
17	39,015.55	31,431.75
18	80,270.84	68,027.16
19	73,463.52	62,355.95
20	64,034.36	51,345.64
21	85,128.10	85,128.10
Total gross sales in all stores in Kentucky	$2,236,148.06	$1,854,174.23

VIII

Plaintiff conducts in each of said retail stores owned or operated by it in Kentucky what is known as a department store, embracing in a typical store of those above mentioned and in practically every one of its stores so mentioned, separate departments, in which plaintiff sells [fol. 22] at retail merchandise of various kinds within the general classification of merchandise sold by it, as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;

(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;

(3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;

(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;

(5) Piece goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;

(6) Notions, Infants' Goods, Toilet Goods.

Each of said retail stores is operated by plaintiff separately from its other stores. A complete set of books of accounts is separately kept for each of said stores. These books show all phases of the operation of said store, such as its sales, expenses of operation, rental, taxes, insurance and all other overhead expense, enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each and every one of its said retail stores. Through this system of record keeping, plaintiff can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policy to develop sales in each store.

[fol. 23] In the conduct of its general business in each of the Kentucky cities or towns in which it owns and operates a store, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in the same city and in other near-by cities in Kentucky, and the same is true as to each department operated by plaintiff in each such retail store inasmuch as each of said departments is compelled to and does actively compete with the specialized stores or with stores dealing in similar lines of goods in the same city or town or near-by cities or towns.

Such competition extends not only to the matter of buying power but also to selling and the fixing of prices on goods sold, so as to make them sell in competition with other dealers in similar goods in the same city or town or near-by cities or towns, and such competition applies not only to plaintiff's conduct of each such store as a whole but as to its conduct of each unit or department in each such store.

[fol. 24] IX

There is in each Kentucky city or town where this plaintiff conducts a retail store a large number of individuals, co-

partnerships and corporations which are engaged in the business of a retail merchant and are in active competition with this plaintiff, and which own and/or operate a single store in which a retail business is carried on similar to that carried on in the same city or town by this plaintiff. Said retail merchants competing with the plaintiff conduct their business under similar circumstances and in many instances do a very much larger volume of business and have much larger gross retail sales than the store of this plaintiff located in the same city or town and directly competing therewith.

This plaintiff, in each of its stores, carries on its business as a retail merchant in every way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively and which are separately owned and/or operated by one individual, co-partnership or corporation doing business as a retail merchant.

Plaintiff deals in the same character or articles and merchandise and sells to the same public and its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns and operates more than one store in Kentucky, though at widely-separated points, while in the case [fol. 25] of other retail merchants competing with it, such retail merchant owns and/or operates but one store in Kentucky, though in many instances such retail merchant actually owns and operates in other States a large number of retail stores conducting the same general kind of business.

The ownership and/or operation by plaintiff of more than one store in different cities or towns does not increase the fire hazard to property in any of said cities or towns, or injure the health or morals of the community, or require increased or additional public or police protection beyond what may be required in the case of any other store of like character handling a similar class of merchandise, regardless of the number of stores that its owner may elsewhere own and operate.

X

The business conducted by plaintiff as a retail merchant in Kentucky and elsewhere has developed gradually through constant study and application of efficient broad-gauge

methods of conducting the business of a retail merchant with due regard to the interests of the buying public and a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale and the development of a large volume of sales and a more rapid turn-over of merchandise and capital.

[fol. 26] The founder of plaintiff's business was J. C. Penney, who began his business career as clerk in a general store. The proprietor of that store helped him to establish himself in a similar business in another town, where he proved to be a successful merchant and soon developed as much business as that town had to offer, whereupon he invested his savings in a similar store, in another city or town, which he put in charge of his principal clerk, and in time the most competent clerk in that store was put in charge of another store in still another city or town. In this way there grew up a chain of stores, in which every manager was a partner or part owner, at least of the store managed by him. In due time a corporation was organized to take over the business thus jointly owned, and to protect the principle of each manager's partnership or part ownership, an opportunity was afforded them to acquire and practically all did acquire stock in the corporation so organized.

The manager of each of plaintiff's stores in Kentucky has charge of practically all matters relating to his particular store—in many instances to the same extent as a sole proprietor thereof. He determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community and can thus be handled or sold to best advantage in that store. He selects all the merchandise to be handled in said store and determines the kind and quality thereof and has sole charge of [fol. 27] supplying his store with goods to be stocked therein for sale.

He likewise maintains a local bank account in the city or town in which his store is located, where he deposits all proceeds received from the sale of goods in his store. From this said bank account he pays the salaries of the employees of his store and all other local expenses and, in his own discretion, from said bank account makes donations and sub-

scriptions to any form of public welfare or civic or cultural organization in his community; and forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof.

The manager of each store is expected to and actually does identify himself with the city or town in which said store is located, and in many instances he owns his own home and is connected with various organizations, such as churches, lodges, luncheon clubs, and local organizations of merchants or taxpayers or citizens generally.

Practically every manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary, and in addition thereto, a percentage of the profits of said retail store conducted by him. A successful manager has always been given the privilege of purchasing stock in plaintiff at a price below the current market quotations, with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, so [fol. 28] that the impo-tion of the unjust tax herein complained of directly affects not only the income of this plaintiff but also the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax not only reduces the profits of said retail store but will inevitably reduce the amount of sales which can be made in said store by rendering this plaintiff and its said local manager unable to meet competition with other stores in the same or near-by localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the illegal tax assailed in this case.

XI

As long as it has been doing business in Kentucky, plaintiff has paid all ad valorem taxes levied upon its property by competent State, county or municipal authority, and has likewise paid all valid or legal excise or occupational taxes exacted of it by any such authority.

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the Commonwealth of Kentucky, during the calendar year 1930, corporation license taxes in the sum of $446.04, and has also paid, during the calendar year

1930, to various cities or towns in Kentucky, license or occupation taxes levied by them respectively in sums aggregating $1,053.50.

Plaintiff does not sell in any of its stores in Kentucky any articles upon the sale of which any license or excise tax is [fol. 29] levied by the Commonwealth of Kentucky.

XII

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiff's method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-hundredth part of the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

[fol. 30] XIII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

XIV

During the calendar year 1930, the total gross retail sales made by plaintiff in all its stores in Kentucky and in all departments conducted by it in its several retail stores, aggregated $2,236,148.06, of which amount, gross retail sales aggregating $1,854,174.23 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales claimed by defendants to be the proper basis for ascertainment of the taxes to be exacted of plaintiff under Chapter 149, Acts of 1930, the [fol. 31] geometrically graduated rates of taxation prescribed by said challenged Act, and deducting all credits allowed plaintiff by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales		$200.00 Tax
2/20 of 1% on next $100,000 of sales		100.00 Tax
5/20 of 1% on next $100,000 of sales		250.00 Tax
8/20 of 1% on next $100,000 of sales		400.00 Tax
11/20 of 1% on next $100,000 of sales		550.00 Tax
14/20 of 1% on next $100,000 of sales		700.00 Tax
17/20 of 1% on next $100,000 of sales		850.00 Tax
1% of excess over $1,000,000 of sales		8,541.74 Tax
Total tax above computed		$11,591.74
Credits allowed under Section 4 of the Act:		
Corporation license tax paid in 1930	$446.04	
License or occupation taxes paid Kentucky cities or towns	1,053.50	
Total credits allowed under Section 4		1,499.54
Net tax levied upon plaintiff		$10,092.20

XIV

Each separate retail store in Kentucky owned or operated by plaintiff as a retail merchant, and likewise each separate department therein, comes into direct competition with a large number of other specialized individual retail stores in Kentucky, conducted by other retail merchants, which deal mainly and often exclusively in a particular [fol. 32] kind or class of goods handled and sold by plaintiff in a particular store in Kentucky, or department therein handling or selling that class or line of goods.

In no single retail store, or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year, or for the

period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000. Nor do the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky as a single store in competition with any retail store of plaintiff, or department therein (either for the entire calendar year 1930 or for the period beginning March 17, 1930, and ending December 31, 1930), exceed in any case the sum of $400,000, and each of such competing stores owned and operated by such other retail merchants has gross annual sales not exceeding $400,000 in amount, and in a vast majority of cases not exceeding $100,000 in amount, and in a great many cases not exceeding $50,000 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in every case taxed, if taxed at all, under said Act in the lowest [fol. 33] bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all its other stores and departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in every case is levied under said Act upon the specialized single store competing with one of plaintiff's retail stores or departments in such retail stores, respectively.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in each retail store and/or in each of the several separate departments thereof operated in Kentucky by plaintiff in

actual competition with other retail merchants in the same city or section of Kentucky that have a smaller volume of gross annual sales and are taxed, if at all, under said challenged Act at the minimum rate of 1/20 of one per cent therein provided.

[fol. 34] Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were each provided for in said Act as an essential part of a legislative scheme to tax retail merchants having [fol. 35] a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have

gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the [fol. 36] kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of their stores or departments therein in competition with said average retail merchants would be added to all the other gross annual sales made in all plaintiff's other stores or departments therein located in Kentucky and thus a large part of said gross subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an aver- [fol. 37] age general retail store and competing with plain-

tiff in the sale at retail of goods of the same kind and character. Credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein would amount to a very insignificant part of the tax levied upon plaintiff by reason of their annual gross sales in each such store or each department therein.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said [fol. 38] stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and suc-

cessfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiff in its retail stores and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and [fol. 39] elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by the plaintiff in its retail stores and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for [fol. 40] some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its

own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class and quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of similar facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in such retail store owned or operated by them in Kentucky.

Hence plaintiff, by reason of its operation of several stores and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold [fol. 41] in plaintiff's store or department competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiff in their various departments established and conducted prior to the opening or establishing of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales

and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discrim- [fol. 42] inate against the ownership or ultimate management of all retail stores in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said [fol. 43] merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales

the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, [fol. 44] oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one [fol. 45] million dollars, after which the increase of gross

sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all [fol. 46] the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great (or greater) purchasing and buying power and have as great (or greater) advertising and merchandising ability as the plaintiff and as other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct

competition with the plaintiff and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the [fol. 47] said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up [fol. 48] and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail mer-

chants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiff and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff and all other retail merchants similarly situated, a large and valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of plaintiff and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by plaintiff [fol. 49] and other retail merchants similarly situated, and, as far as possible under said Act, to divert trade and custom from the retail stores of plaintiff and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed at rates very much lower than those exacted by said Act of plaintiff and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in uniformity in its application to the persons or occupations taxed thereunder, and it designedly transfers to and imposes upon plaintiff and all other retail merchants similarly situated an undue proportion and practically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by plaintiff and

other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to plaintiff and other retail merchants similarly situated the equal protection of the laws guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

[fol. 50] XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiff conducts in its retail stores, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest [fol. 51] to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiff brings this suit on its own behalf and on behalf of all such individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiff or any of the other

retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiff or any of said other retail merchants on whose behalf this suit is brought.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

[fol. 52]

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff states that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including plaintiff, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or

causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

[fol. 53] XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed [fol. 54] by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the

specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiff says that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the [fol. 55] provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory

against the plaintiff and all other retail merchants similarly situated, and in that it taxes plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, [fol. 56] and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiffs and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his war- [fol. 57] rant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer

could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor [fol. 58] of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiff and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiff the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $10,092.20 as hereinbefore computed and stated, and also to compel plaintiff, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting *of*

$1,854,174.23, upon which, under said Act, a tax would result against this plaintiff of $10,092.20 as hereinabove set out, and will also proceed to enforce the excessive penalties [fol. 59] provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

[fol. 60] (3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as taxpayers of the Commonwealth of Kentucky.

(4) If plaintiff and other similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys'

fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Ac- [fol. 61] counts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores and needed by them to carry on their business therein. The payment of so large a sum of money

will impair the ability of the plaintiff to operate their business in Kentucky and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advan-
[fol. 62] tage over the plaintiff, and thereby decrease the amount of gross annual sales and of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky and for all such wrongs the plaintiff has no plain, adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal Constitution.

Prayer for Relief

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their suc-
[fol. 63] cessors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the non-

payment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482 entitled: "An act relating to revenue and taxation, imposing an excise or [fols. 64 & 65] license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all was in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiff.

[fol. 66] In United States District Court

Order Permitting Plaintiff to Sue as Representative of Class—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in

plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 67] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecu- [fol. 68] tion or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 69] IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 70] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 71] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, J. C. Penney Company, by counsel, and upon its verified Bill of Complaint herein, entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

[fol. 72] (b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage

will result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 73] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been [fol. 74] wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges cannot be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this

Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 76] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, solicitors for plaintiffs.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, solicitors for all defendants.

[fol. 77] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise", line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act", line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 78] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of

no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 79 & 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931

Come the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually as Auditor of Public Accounts of the Commonwealth of Kentucky, and, for their answer to the bill of complaint filed in the above styled action, plead as follows, to-wit:

I

For answer to paragraph I of plaintiff's bill of complaint, they say that they do not have sufficient information to answer the allegations contained in the first two literary paragraphs thereof relating to the organization of plaintiff and its authority to do business in this State [fol. 81] and, therefore, neither admit or deny the same but require strict proof thereof. They admit, however, all

the allegations contained in the third, fourth, and fifth literary paragraphs of said paragraph I.

II

For answer to paragraph II, defendants deny that an Act of the General Assembly of Kentucky, 1930 Session, approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, same being Chapter 149 of the Session Acts of 1930, is void for the reasons set out in the bill of complaint, or at all. Defendants admit all the other allegations contained in said paragraph II.

III

The defendants, for answer to paragraph III of plaintiff's bill of complaint, deny that this action is a suit of a civil nature or should be brought for the purpose of enjoining the defendants, or either of them, from enforcing, or attempting to enforce, said Act, or for the purpose of enjoining the defendants, or either of them, from requiring the plaintiffs, or other tax payers, or tax payer, similarly situated as hereinafter set forth, to make reports which said Act purports to require of retail merchants, or requiring information in reference to sales made by the plaintiffs, or either of them, or all said retail merchants similarly situated as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated, and tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiff, or any of said retail merchants similarly situated as herein- [fol. 82] after set forth, or to recover any of the penalties sought to be imposed by said Act upon the plaintiff, or any of said retail merchants similarly situated as hereinafter set forth, because of a violation of any of the terms of said Act.

Defendants deny that said Act is unconstitutional, null or void *because*, in the respects hereinafter stated, or that it is violative of the various provisions, or any provisions of the Constitution of the United States or of the 14th Amendment thereto, or violative of various provisions of the Kentucky Constitution hereinafter set out.

IV

Defendants, for answer to paragraph IV of the bill of complaint, admit that House Bill 111 was introduced in the House of Representatives on January 31, 1930, with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth" and then it was so read. They deny, however, that it was on February 14, 1930, or on any other date, read with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth," by the Committee on Kentucky Statutes, or that it was ever read on February 18, February 19, or on any other date by said title, or by any other title, except the one shown on the enrolled bill as same appears in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herewith and made part hereof as if copied herein in full, marked exhibit "A". They deny that it was read, voted on, passed, signed, approved or enrolled by a other title than the one shown by the certified copy above referred to.

[fol. 83] V

Defendants, for answer to paragraph V, deny that said House Bill No. 111 was introduced in the House of Representatives in response to the recommendation made by the Governor of Kentucky, in his annual message of January, 1930, for legislation to be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated in aid of such individually owned or operated stores. They deny that, while said House Bill No. 111 was pending before the House Committee to which it was referred on its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on or about February 1, 1930, in which a measure similar in legal effect to said House Bill No. 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States or therefore void. They deny that the purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred or that the bill as so amended or passed in

the manner hereinbefore set out or approved by the Govmernor was so framed as to contain the obnoxious or unconstitutional features hereinafter set out.

VI

Defendants, for answer to paragraph VI of the bill of complaint, admit all the allegations contained in said paragraph VI.

VII

Defendants, for answer to paragraph VII of the bill of complaint, say that they have not sufficient information to answer the allegations contained therein and, therefore, they neither deny or admit the same, but require strict proof thereof.

[fol. 84]

VIII

The defendants, for answer to paragraph VIII of the bill of complaint, deny that plaintiff conducts in each of said retail stores, owned or operated by it in Kentucky, what is known as a department store, embracing in a typical store of those mentioned above, and in particular every one of its stores so mentioned, separate departments, in which plaintiff sells at retail merchandise of various kinds within the general classification of merchandise sold by it as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;
(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;
(3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;
(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;
(5) Piece Goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;
(6) Notions, Infants' good-, Toilet Goods.

Defendants deny that each of said retail stores is operated by plaintiff separately from itsother stores or that it keeps a complete set of books or accounts separately for each or any of said stores, or that these books show all phases of the operation of said stores such as its sales, expenses of

operation, rental, taxes, insurance or all other overhead expenses enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each or every one of its said retail stores.

They deny that plaintiff, through its system of record keeping, can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policies to develop sales in each store.

[fol. 85] The defendants deny that the plaintiff, in the conduct of its general business in each or any of the Kentucky cities or towns in which it owns or operates a store, comes into competition with a large or any number of other stores selling merchandise of a similar character in the same city or in other cities in Kentucky. They deny that the same is true as to each department operated by plaintiff in each or any such retail store in as much as each of said departments is compelled to or does actively compete with specialized stores or with stores dealing in similar lines of goods in the same city or any city or town or in nearby cities or towns. They deny that such competition, or any competition, extends not only to the matter of buying power but also to selling or the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in the same city or any city or town or nearby cities or towns, or that such competition applies not only to the plaintiff's conduct of each such store as a whole or as to its conduct of each unit or department in each such store.

IX

The defendants, for answer to paragraph IX of the bill of complaint, deny that there is in each Kentucky city or town where this plaintiff conducts a retail store or any store, a large or any number of individuals, co-partnerships or corporations which are engaged in the business of a retail merchant or are in active competition with this plaintiff, or which owns or operates a single store in which a retail business is carried on similar to that carried on in the same city or town or any city or town by this plaintiff. They deny that said retail merchants competing with the plaintiff conduct their business under similar circumstances or in any instances do a larger volume of business

or have a larger gross retail sales than the store of this [fol. 86] plaintiff located in the same city or town or directly competing therewith. They deny that this plaintiff, in each or any of its stores, carries on its business as a retail merchant in any way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively or which are separately owned or operated by one individual, copartnership or corporation doing business as a retail merchant.

They deny that the plaintiff deals in the same character of articles or merchandise or sells to the same public or its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns or operates more than one store in Kentucky, though at widely separated points. They deny that there are other retail merchants competing with the plaintiff operating but one store in the State of Kentucky, or that such merchants own or operate but one store in Kentucky, or in any instance, operate in other states a large or any number of retail stores conducting the same general kind of business as plaintiff.

X

The defendants, for answer to paragraph X of the bill of complaint herein deny that the business conducted by plaintiff as a retail merchant in Kentucky, or elsewhere, has developed gradually through constant study or application of efficient broad-guage methods of conducting the business of a retail merchant with due regard to the interests of the buying public or a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale or the development of a large volume of business or sales or a more rapid turnover of merchandise or capital.

The defendants deny that the founder of plaintiff's business put into operation the chain store business or [fol. 87] that the chain store business was established by J. C. Penney, who proved to be a successful merchant and invested his savings in stores of similar kind in different cities, or that he put in charge of any stores his principal or most competent clerks, or that persons who had charge of

plaintiff's stores, as managers or employees, all or any acquired stock in his stores. They deny that the manager of each of plaintiff's stores in Kentucky has charge of practically all or any matters relating to his particular store, or that in any instances the manager has charge to the same extent as a sole proprietor thereof. They deny that he determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community or what line of goods can thus be handled or sold to the best advantage in that store. They deny that the manager selects all or any of the merchandise to be handled in said store or departments the kind or quality thereof, or has sole or any charge of supplying his store with goods to be stocked therein for sale. Defendants deny that the manager maintains a local bank account in the city or town in which his store is located where he deposits all or any of the proceeds received from the sale of the goods in his store, or that from said bank account the manager pays the salaries of the employes of his store or any other local expenses or, in his own discretion, from said bank account makes donations or subscriptions to any form of public welfare, civic or cultural organization in this community, or that he forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof. They deny that the manager of each or any such stores is expected or actually does identify himself with the city or town in which said store is located or, in any instance, he owns his own home or is connected with various organizations, such as churches, lodges, luncheon clubs or local organizations [fol. 88] of merchants or taxpayers or citizens generally. They deny that any manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary or, in addition thereto, a percentage of the profits of said retail store conducted by him. They deny that a successful manager has always been given the privilege of purchasing stock in plaintiff's company at prices below the current market quotations with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, or that the imposition of any tax herein complained of, directly or indirectly, affects either

the income of this plaintiff or the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax either reduces the profits of said retail store or that it will reduce the amount of sales which can be made in said store either by rendering this plaintiff or its local manager unable to meet the competition with other stores in the same or nearby localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the tax assailed in this case.

XI

The defendants, for answer to paragraph XI of the bill of complaint, say that they have no information as to the allegations contained therein and, therefore, they neither deny or admit the truth of such allegations, but require strict proof thereof.

XII

Defendants, for answer to paragraph XII of the bill of complaint, say that they have no information as to the peculiar methods by which plaintiff conducts its business and, therefore, they neither deny or admit any statement [fol. 89] contained in said paragraph relating thereto, but require strict proof thereof.

They further say that, in so far as said Chapter 149 of the Acts of 1930, referred to in said paragraph, they deny that such Act is purely a tax measure or that it is not an exercise of police power or that it does not relate to the public health or public welfare, public morals or the public safety.

XIII

Defendants, for answer to paragraph XIII of the bill of complaint, deny that the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or, as hereinafter more specifically shown, the classification of retail merchants therein made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or in its higher brackets of taxa-

tion, is confiscatory as to this plaintiff, or others similarly situated, or at all.

XIV

Defendants say they do not have sufficient information to answer the allegations contained in paragraph XIV of plaintiff's bill of complaint and, therefore, neither deny or admit the same, but require strict proof thereof.

Defendants deny that any retail store in Kentucky owned or operated by plaintiff, as a retail merchant, or any separate department therein, comes into direct competition or any competition with a large or any number of other spe- [fol. 90] cialized individual retail stores in Kentucky conducted by other retail merchants, which deal at all in a particular kind or class of goods handled or sold by plaintiff in a particular store in Kentucky, or department therein handling or selling that class or line of goods.

They deny that in no single retail store or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000.00. They deny that the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky, as a single store, in competition with any retail store of plaintiff, or department therein, did not exceed for the entire calendar year 1930, or for the period beginning March 17, 1930, and ending December 31, 1930, in any case the sum of $400,000.00, or that each of such competing stores owned or operated by such other retail merchants had gross annual sales not exceeding $400,000.00 in amount, or that in a vast majority of or any cases not exceeding in amount $100,000.00, or that in any cases not exceeding $50,000.00 in amount.

Defendants deny that it thus resulted that the Act of 1930 designedly or otherwise, by its terms, worked a discrimination against plaintiff or that said Act denies to plaintiff the equal protection of the law or imposes upon it an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in any case taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by

Section 4 of said Act. They deny that the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all [fol. 91] its other stores or departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act. They deny that at the rate of one per cent plaintiff's tax rate is twenty times or any times in excess of the rate that in any case is levied under said Act upon a specialized single store competing with one of plaintiff's retail stores or departments in such retail stores respectively.

XV

Defendants, for answer to paragraph XV of the bill of complaint, deny that such Act of 1930 contains in Section 4 thereof a provision which in effect, or otherwise exempts from the payment of any tax thereunder all or any retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in any retail store or in any of the several departments thereof operated in Kentucky by plaintiff in actual competition with other retail merchants in the same city or section of Kentucky that have a smaller volume of gross annual sales or are taxed under said challenged Act at the minimum rate of 1/20 of one per cent therein provided.

Defendants deny that Section 4 of said challenged Act provides in substance or effect, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact, or at all, provided so as to in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under the [fol. 92] laws now in force, or hereafter enacted, shall be a substitute for any license tax otherwise exacted of them under the Act.

Defendants deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied

thereunder, are sufficient in practically all cases, or any cases, to offset the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000.00, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or the allowance of said credits by way of remission of the tax levied in the Act or the graduation of said tax were each provided for in said Act as a part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

Defendants deny that there are few retail merchants in Kentucky whose gross annual sales, in a single or individually owned store, exceed $400,000.00, or the gross annual sales of all or any of such retail merchants are below $100,000.00, or in any instances below $50,000.00.

Defendants deny that, in practical effect or operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have annual sales in all their stores or departments aggregating more than $400,000.00 are subject to taxation under said Act in any appreciable amount or those who are taxed at all constitute a small class or limited number, as compared with the number of retail merchants who are wholly or at all exempt from taxation under said Act. Defendants deny that there is no just or reasonable basis for [fol. 93] the classification of retail merchants for the purpose of taxation under said Act.

Defendants deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000.00, or has gross annual sales aggregating less than $50,000.00, or such a retail merchant would, as a rule, or at all, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10.00 to $15.00.

Defendants deny that, if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000.00, fully paid in or invested in its single retail store in Kentucky, or has therein gross annual sales of $50,000.00, it could not be

assessed under said Act of 1930 with a tax exceeding $25.00, or as a matter of fact, or otherwise, in general practice it would not be assessed with any tax at all, or with a smaller tax than $25.00, because its annual corporation license tax levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per thousand dollars of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would at all offset any tax imposed upon it by said Act, or would thus be a substitute for any tax so imposed upon it by said Act.

Defendants deny that the volume of annual gross sales made by plaintiff in one of its stores, or departments therein, in competition with any retail merchant would be added to any other gross annual sales made in any of plaintiff's other stores, or departments therein, located in Kentucky or thus subjected to a tax at the rate of one per cent as compared with the tax of 1/20 of one per cent levied by said Act upon any other retail merchant conducting any retail store or competing with the plaintiff in the sale at [fol. 94] retail of goods of the same kind or character. Defendants deny that credits allowed plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein, would amount to an insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in each store or each department therein.

XVI

The defendants, for answer to paragraph XVI, deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments, as defined in said Act, to aggregate for the purposes of taxation the gross sales of stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separate or distinct enterprises; without regard to their location or without regard to the fact that said stores, or departments, are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

Defendants deny that the design, intent or practical operation of said Act is thereby to tax, penalize or, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of management.

[fol. 95] XVII

Defendants, for answer to paragraph XVII, deny that, for many years past, or at all, there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording to so called individual or single-store retail merchants engaged in Kentucky, or elsewhere, in the business of selling at retail, goods, wares, or merchandise of the character handled or sold by plaintiff in its retail stores or by retail merchants generally throughout Kentucky, or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in any material respects as to price, quality or kind with the merchandise handled or sold by plaintiff in its retail stores or by other retail merchants similarly situated.

Defendants deny that these co-operative associations or agencies, for a comparatively small fee or at all, afford to retail merchants operating individual specialized stores throughout Kentucky, or elsewhere, affiliated with them, all or any of the facilities or advantages, in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organizations operating on its own account, or in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines, or at all.

Defendants deny that such co-operative associations or agencies afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in advertising the goods of such retail merchants to

the buying public, or as advice or suggestions as to the most [fol. 96] approved or advanced method of selecting goods of the proper style or quality, or for displaying such goods in the retail stores of the various merchants affiliated with such co-operative association or agency. Defendants deny that practically all, or any, retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000.00, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services or facilities thus, or at all, afforded by said co-operative associations or agencies. Defendants deny that, in this manner, or at all, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his, or its own, account a stock of merchandise for sale in his or its retail store or stores, or that they can buy goods of as high class or quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of similar facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or in practically any case it is, less than $400,000.00 per annum in such retail store owned or operated by them in Kentucky. Defendants deny that plaintiff, by reason of its operation of several stores or the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. Defendants deny that any of such specialized individual stores have gross annual sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in plaintiff's store, or department, competing with such specialized individual retail merchant.

[fol. 97] Defendants deny that the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. Defendants deny that any of such specialized individual retail stores competing with the plaintiff have, by reason of their advantages, or otherwise, made

substantial or any inroads or encroachments upon the trade of plaintiff in any departments established or conducted prior to the opening or establishment of such individual stores now operating in competition with plaintiff.

Defendants deny that there is no just, proper, or reasonable basis for discrimination in the matter of taxation against this plaintiff or in favor of the retail merchant conducting a specialized individual store.

XVIII

Defendants, for answer to paragraph XVIII, deny that the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, or with the sole or any design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of all, or any, retail stores in Kentucky having a large volume of gross sales (whether in one store or more, or in one department or more in the same store), or thus or at all unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky, or in any State, to increase their sales above $400,000.00. Defendants deny that said increase in its practical operation or effect is unequal or disproportionate in the percentage of tax per one thousand [fol. 98] dollars of increased sales. Defendants deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to the plaintiff or other retail merchants similarly situated.

XIX

Defendants, for answer to paragraph XIX, deny that the classification or graduation made as a basis for the tax imposed rests wholly upon the amount of gross sales of any stores controlled or held with others by a majority stock ownership, or controlled or directed by one management or association of ultimate management; or that said classification does not rest upon the ability of the taxpayer to pay said tax, or upon the income or earnings from any store or stores, or that it has no relation to receipts. They deny that it is imposed regardless of whether said sales

are made at a profit or loss or the amount of profit or loss therefrom; or that it has no relation to profits or losses. They deny that it has no relation to the capital employed or invested, or that said Act does not make any provisions for the merchandise returned; for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received. They deny that it classifies sales as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation. They deny that said Act taxes the dollar of sales of any retail merchant upon a rate or basis different from the dollar of sales of other merchants engaged in direct competition or similarly circumstanced. They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times or any times as much on his dollar of sales as his competitor who, in the same class or similarly circumstanced, is required to pay on his dollar of sales, or that said classification is un- [fol. 99] reasonable, without a rational basis, or is arbitrary, unequal or oppressive.

XX

Defendants, for answer to paragraph XX of the Bill of Complaint herein, deny that competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying goods upon a large scale or for scientific or efficient arrangements of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combined co-operatively have as great or greater number of stores or have as great, or greater, purchasing or buying power, or have as great, or greater, advertising or merchandising ability as the plaintiff or as other retail merchants who own two or more stores in Kentucky or conduct two or more departments in any retail store so owned or operated by them. They deny that said singly or individually owned stores or

members of co-operative associations, as aforesaid, similarly circumstanced, are in direct competition with the plaintiff or with other retail merchants owning two or more stores, or are required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff. They deny that the practical operation or effect exempts single or individual stores from taxation in said Act. They deny that the plaintiff [fol. 100] is subject to taxation at the highest rate prescribed in said Act, or that, by reason thereof, or at all, such competitive stores are given undue or unfair economic advantages over the retail store of the plaintiff, or over other retail merchants similarly situated, or are in effect aided, helped or subsidized by said Act in their competition with the plaintiff or other retail merchants similarly situated.

XXI

The defendants, for answer to paragraph XXI in the Bill of Complaint, deny that this retail merchant is required, by reason of a small percentage of profit on a single sale to have a large volume of sales, or to continuously increase its sales volume, in order to secure a fair return on the capital employed by it in his business. They deny that the highly competitive character of the retail business, in which plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith. They deny that the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business upon the basis of selling merchandise at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated or are dependent upon a large volume of

sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated, or are of benefit to the [fol. 101] general public of the Commonwealth of Kentucky or have brought to the plaintiff or any other retail merchants similarly situated, a large or valuable good will or a large sales volume.

XXII

The defendants, for answer to paragraph XXII of the Bill of Complaint herein, deny that the rate of taxation, exacted by said Act, of plaintiff or other retail merchants similarly situated are unfair, unjust, unequal, oppressive or discriminatory or that they impose upon them an unjust or intolerable, or any, burden for the benefit or other retail merchants engaged in like business having a smaller volume of annual gross sales, or at all, or that it will destroy or impair, or that the purposes of said Act is to destroy or impair, the good will or established trade or business or thereby to reduce the volume of annual gross sales made by plaintiff or other retail merchants similarly situated, or to in anywise divert trade or custom from the retail stores of plaintiff or other retail merchants similarly situated, or taxes in the higher brackets of taxation, or taxes other retail merchants having a smaller of greater annual gross sales wholly taxed under the lower rates of said Act.

They deny that said Act, in its purpose or effect, is wholly or at all lacking in uniformity in its application to persons or occupations taxed thereunder, or that the Act designedly or at all transfers to or imposes upon plaintiff or any other retail merchants similarly situated any proportion or practically all or any of the burden of the license taxes in said Act levied upon retail merchants. They deny that the said Act thus designedly, or otherwise, discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid wholly or at all by plaintiff or other retail merchants similarly situ- [fol. 102] ated who have annual gross sales in large volumes. They deny that said Act denies to plaintiff or other retail merchants similarly situated the equal pro-

tection of the laws guarante-d to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or by the fundamental laws of the State of Kentucky.

XXIII

The defendants, for answer to paragraph XXIII of the Bill of Complaint, deny that there is a large or any number of retail merchants engaged in Kentucky in the operation of one store, either with or without separate departments therein, such as plaintiff conducts in its retail stores or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership, or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with the plaintiff in that, under said Act, each or any of them is subject to taxation in the higher brackets or that taxes are excessive, unjust, or discriminatory, by reason of the larger volume of gross annual sales made by them or for any reason, to the exclusion of any number of retail merchants competing with them respectively, who have smaller gross annual sales or, by reason of credits allowed under Section 4, or any other section, of said Act are required under said Act to pay no tax whatever or an insignificant amount of taxes.

XXIV

Defendants, for answer to paragraph XXIV of the Bill of Complaint, admit each and every allegation contained therein.

[fol. 103] XXV

Defendants, for answer to paragraph XXV of the Bill of Complaint, admit that they will attempt to enforce said Act according to its several provisions. They deny however, that such enforcement will work irreparable or any injury or damage to the plaintiff or other retail merchants similarly situated.

XXVI

The defendants, for answer to paragraph XXVI of the Bill of Complaint, deny that Section 13 of the emergency

clause of said Act is void for any reason, or for the reason that the emergency therein recited has no connection with or relation to the purposes for which said Act was enacted by the General Assembly, or that under a decision of the Court of Appeals of Kentucky sufficient reasons *to* meeting the requirements of Section 55 of the Kentucky Constitution was not assigned for making said Act take effect upon its approval by the Governor.

XXVII

Defendants, for answer to paragraph XXVII of the Bill of Complaint, deny that said Act, in any of the particulars hereinbefore pointed out, or at all, is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates the provisions of the Constitution of Kentucky as herein set forth, or at all.

(1) Deny that said Act, for the reasons hereinbefore set forth, or at all, is void in the several respects and particulars hereinbefore pointed out, or at all.

(a) Defendants state that said Act does not deny to plaintiff, or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon [fol. 104] them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder by gross sales of retail merchants made prior to June 17, 1930.

(b) Defendants state that said Act does not deny to plaintiff, or other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff, or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or prohibitive rate of taxation, based upon classification that is unreasonable, unjust or discriminatory against the plaintiff or other retail merchants similarly situated. Deny that it taxes this plaintiff, or other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever or without any

reasonable basis of classification, or at the same time imposes upon other retail merchants, doing the same kind of business in susbtantially the same way, a lower rate or burden of taxation, or as to an overwhelming number, or any number, of such retail merchants, exempts them from any taxation whatever under said Act.

(c) Deny that, for the reasons hereinbefore set forth, or at all, said Act abridges the privileges or immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, or at all, or that it is illegal or void.

(2) Deny that said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis or classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of Kentucky.

XXVIII

Defendants, for answer to paragraph XXVIII of the Bill of Complaint, deny that a mandamus for a refund of [fol. 105] taxes wrongfully collected could only be brought where the tax is paid under protest or after its payment, or that it could only be brought or prosecuted in the courts of Kentucky, or that a judgment therein in favor of the complaining tax payer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if or when the funds were available for the payment of such warrants in the usual or orderly course.

Defendants deny that the taxes collected under said Act do not go into the General Fund of the Commonwealth or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, or can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Defendants deny that it is shown by the monthly financial statement officially issued by the State Treasurer of

Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81, or that there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State treasury or presented for payment but not paid for lack of funds.

Deny that, by reason of the facts herein set forth, or at all, the plaintiff has no remedy whatever in the courts of the State of Kentucky or any remedy at law whatever in the courts of the United States.

XXIX

Defendants, for answer to paragraph XXIX of the Bill of Complaint, admit that they will attempt to enforce the [fol. 106] provisions of this Act, but deny that said Act is illegal or invalid or that the tax which will be exacted from the plaintiff is an illegal tax. They further say that they have no information upon which to answer the allegations in said paragraph as to the amount of tax plaintiff will be compelled to pay and, therefore, neither deny or admit such allegations, but require strict proof thereof.

XXX

Defendants, for answer to paragraph XXX, deny that, unless they are restrained from enforcing or attempting to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable or any loss or injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars, or at all:

(1) Deny that the plaintiff, or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment, or for which they are not legally liable.

(2) Deny that, upon the failure of the plaintiff or others similarly situated to pay said taxes, the drastic penalties provided by said Act will be enforced by the defendants against the plaintiff or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes or penalties or criminal proceedings

brought to impose the criminal penalties provided in Section 7, of said Act, at great expense or damage to it or them.

(3) Deny that the expenditure by the defendants of the public funds raised by taxation for the purpose of trying to enforce and carry out the provisions of said Act will be to the irreparable or any injury or damage of the plaintiff as [fol. 107] taxpayers of the commonwealth of Kentucky.

(4) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they will be put to large expense or any expense, for attorneys' fees or court costs, or be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums or any sums which it would be required to expend in prosecuting such actions for attorneys' fees, court costs or any other expenses, or in any sums for said purposes.

(5) Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States, or that in consequence thereof, or at all, the plaintiff or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States. Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him, under protest, or that said Section 10 of said Act of 1930 and Section 162 of the Kentucky Statutes, are the only statutes of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

[fol. 108] Defendants deny that, by no other statute, has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the re-

covery of taxes illegally exacted from a taxpayer or covered into the treasury of the State.

(6) Defendants deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) Deny that the amount of said annual tax which plaintiff will be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores or is needed by them to carry on their business therein. Deny that the payment of such a sum of money will impair the ability of the plaintiff to operate its business in Kentucky or will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair or undue advantage over the plaintiff, or thereby decrease the amount of gross annual sales or of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky, or that the plaintiff has no plain, adequate or complete remedy at law, or that the same is true as to all or any other retail merchants similarly situated.

(8) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing any lawful business in which the plaintiff, or others similarly situated, are engaged or in which they have the undoubted right to engage, which right is guaranteed and protected by the State and Federal Constitutions.

[fol. 109] XXXI

For further answer herein, defendants deny each and every allegation of the bill of complaint not heretofore specifically admitted, controverted or denied.

For further answer, the defendants aver and allege as follows:

(1) The Act in question (House Bill 111, now Chapter 149 Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods, ware and merchandise at retail in this Commonwealth.

Retail merchants are, under the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant," as defined in said Act, includes every person, firm, corporation, association or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon every merchant doing the same amount of annual gross retail business without regard to whether said merchant operates one store or many stores.

(2) The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross sales, but also upon the ability of the merchants affected by the various gradations of the Act to pay the tax imposed. It being a well established economic law of merchandising that the per cent. of income per dollar of investment increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants engaged in a retail business in this Commonwealth having gross annual sales of less than $400,000.00 per annum as a class have a net average annual income of only 6.2% upon their investment, and those merchants engaged in a similar retail business having gross annual sales of more than $400,000, or less than $1,000,000, have an average annual income as a class [fol. 110] of 7.1% on their invested capital, and retail merchants engaged in a similar business in this Commonwealth having sales of more than $1,000,000.00 per year have an annual income of 9.5-12.1% on their investment.

Defendants further say the examples set out above are illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

(3) Defendants say that the progressive increase of earning power in invested capital, based on increased volume of sales, as illustrated in the paragraph above, conclusively proves a proportionate increase in ability to pay the amount of tax collected.

Defendants further allege that the plaintiff, J. C. Penney Company, and all others similarly situated, have for many years enjoyed and are now enjoying a large and prosperous retail business in this State, and that their gross annual retail sales have, in many instances, exceeded $3,000,000.00 per annum and they have made and are now making a profit

of more than 4.3% of such gross annual sales and that their net profit on their capital invested i the retail business in this Commonwealth was and is annually more than 9.2%.

(4) Defendants further say that the increased ratio of earning power of capital invested to volume of sales is brought about by the operation of certain well known and well recognized economic laws as follows:

(a) It is a well established and well recognized law of merchandising economics that the greater the volume of sales the greater the buying power, and that goods, wares and merchandising such as sold by this plaintiff and others similarly situated can be purchased at a much lower price in great volume than in small volume and that the purchasing power alone of plaintiff, and others similarly situated, enables them to purchase goods, wares and merchan- [fol. 111] dise at —% less than goods, wares and merchandise of like quality can be purchased by individual retail merchants having a small volume of sales and who are in competition with this plaintiff, and others similarly situated.

(b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as the volume increases, that is to say, retail merchants doing an annual retail business comparable to that done by this plaintiff do a very much greater volume in ratio to capital invested than do individual merchants having a small volume of annual business.

(c) It is a well established rule of merchandising economics that the cost of marketing decreases per dollar of sales as volume increases and this plaintiff, and others similarly situated, can and do distribute at retail goods, wares and merchandise sold by them at much less expense than a like amount of similar merchandise can be distributed through the stores of other individual competitors.

(d) Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth

and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes [fol. 112] on invested capital will be taxed at the higher rates under said Act.

(e) Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff, and others similarly situated, by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business but are forced to compete directly with this plaintiff, and others similarly situated; that this plaintiff, and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying, and have never paid, their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than 0.45% upon their volume of sales, while their smaller competitors have been forced to pay .7% on their volume of sales.

5. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

6. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Com-
[fol. 113] plaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 114] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed March 23, 1932

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiff's motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 115] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,
D. T. Petty,
John E. Donahue,
Louie J. Jones,
M. R. Anderson,
R. W. Owens,
Fred Levy,
N. A. Bash,
B. E. Van Antwerp,
M. S. Gesley,
W. T. Morgan,
H. H. Craven,
C. W. Gowin,
J. A. Gude,
L. M. Ross,
Milton Marx,
Paul H. Nystrom,
John B. Bonham,
Gilbert J. Schneider,
John Scanlan,
Brack M. Ferrill,
C. J. Henry,
Crawford Lee,
Dann Byck,
G. H. Parker,
C. R. Leininger,
W. G. Howell,
A. C. Miller,
W. G. Jenkins,
T. B. Jones,
B. E. Willis,
B. A. Aistrop,
Dolph Wile,
Daniel M. Cohen,
W. A. Steiden,
Albert Berger,
Chris Schumann,
Arch B. Davis,
Harman Noe,
Robert J. McKim,
C. B. Turley,
James R. Karibo,
E. R. Probasco,
E. C. Purvis,
O. A. Rhodes,
Robert Wright,
P. O. Wolverson.
J. D. Delano,
H. C. Amstutz,
C. H. Parsons,
James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 116] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for an interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 117] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDE & GLENN and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A de-
[fol. 118] cision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that

said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against [fol. 119] the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction

Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver — the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 120] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 336. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his

official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that [fol. 121] the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted

by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this [fol. 122] fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10

priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State [fol. 123] to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest cannot be collected from a sov-

ereign State unless its recovery is specifically authorized by [fol. 124] a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer cannot recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which [fol. 125] could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the

final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal priciples. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the state undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 126] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 127] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and Fred Levy, et al., against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any in-
[fol. 128] junctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing

its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, [fol. 129] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon

its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fol. 130] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—January 7, 1932

This day came the parties in the above-styled three causes, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed, in compliance with the order and decree of this court entered herein December 9, 1931, conditioned as therein provided, to secure the Commonwealth of Kentucky on account of its claims for taxes for the years 1930 and 1931, together with interest, court costs and all other proper charges that may accrue thereon against the following named taxpayers respectively:

The Stewart Dry Goods Company.
Levy Bros.
J. C. Penney Company.
Kaufman Straus Company.
H. P. Selman & Company.
Montgomery Ward & Co., Incorporated.
Herman Straus & Sons Company, Inc.
J. Bacon & Sons.
John C. Lewis Company, Inc.
Central Furniture Company.
Byck Bros. & Co., Inc.
Ewing-Von Allmen Dairy Company, Inc. (Successors to D. H. Ewing's Sons).
Hook Drug Company, Inc.
S. M. Goldberg Operating Co.
Ben Snyder, Inc.

Said bonds with their respective sureties and/or securities deposited and pledged thereon are hereby accepted and approved as a compliance with the order and decree of this Court above-mentioned.

Chas. I. Dawson, Judge.

[fol. 131] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SUBSTITUTION—Filed March 1, 1932

This day, came the parties herein, by counsel, and stipulated that J. Dan Talbot, a citizen and resident of the Western District of Kentucky, was duly elected Auditor of Public Accounts of the Commonwealth of Kentucky at the November election in 1931; that the term of office of Clell Coleman as Auditor of Public Accounts expired on January 4, 1932, whereupon the said Coleman left said office and the said J. Dan Talbot, on said date, duly qualified and took the oath of office as Auditor of Public Accounts of the Commonwealth of Kentucky, succeeding said Coleman, and is now the duly qualified Auditor of Public Accounts of the Commonwealth of Kentucky.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Counsel for Plaintiff. S. H. Brown, Counsel for Defendants.

[fol. 132] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING AUDITOR OF PUBLIC ACCOUNTS, ETC.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 133] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 1, 1932

The plaintiff, P. C. Penney Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed in the motion of plaintiff for such interlocutory injunction, hereby appeals to the Supreme Court of the United States from said order and decree denying its motion for an interlocutory injunction as prayed therein.

The plaintiff, further conceiving itself aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss this plaintiff's bill of complaint and directs the dismissal of said bill of complaint and denies to this plaintiff a permanent injunction or any injunctive or other relief prayed by it and adjudges that plaintiff's said bill of complaint be dismissed and that the defendants recover of plaintiff there costs in this cause expended, hereby appeal to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to this plaintiff a permanent injunction, or any injunctive or other relief prayed by it, and decrees that its said bill of complaint be dismissed and that the defendants recover of this plaintiff their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein [fol. 134] designated of said order and decree herein appealed from.

Plaintiff prays that its said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each

of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered to be duly authenticated and sent to the Supreme Court of the United States.

J. C. Penney Company, by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

[fol. 135] In United States District Court

Assignments of Error—Filed March 1, 1932

The plaintiff, by counsel, respectfully represents that in the records and proceedings had in the above-entitled cause and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiff makes the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiff's motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiff's bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill as unconstitutional and hereinafter, for brevity, referred to as the challenged Act, affords to the plaintiff a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to plaintiff by any provision of Kentucky law is

plain or adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiff.

[fol. 136] (3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiff in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the amount of any illegal tax exacted of plaintiff, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its Auditor of Public Accounts as its representative, that might be brought by plaintiffs in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts as its representative, might be sued at law in any court of the United States in an action by plaintiff for the recovery of illegal taxes exacted of it under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest thereon, might be recovered in any action in any court of [fol. 137] the United States, or in any other court except a court of competent jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky,

against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiff under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

(10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreasonable delay would be encountered by plaintiff in obtaining a refund or a recovery of illegal taxes exacted of plaintiff under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when pre-
[fol. 138] sented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiff in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-*618*, to the effect that it is the duty of the Treas-

urer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

(14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiff any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and to the prompt administration thereof, as the [fol. 139] remedy in equity herein sought by plaintiff.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiff.

(16) The court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiff on taxes illegally exacted of it under the challenged Act.

(17) The Court erred in holding that plaintiff, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to it pursuant to any such judgment, can legally or equitably be required, upon the non-payment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

(18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve

a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiff under said Act in successive years during the pendency of suits testing the validity of such Act.

[fol. 140] (19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiff pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of itself and a numerous class of other retail merchants similarly situated, more than forty of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the constitutionality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims herein asserted by plaintiff on its own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law by plaintiff and numerous other retail merchants similarly situated, as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S. 613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

[fol. 141] (2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the

challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal protection Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 142] (4) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiffs' motion for an interlocutory injunction, that the challenged Act, in its actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiffs, while at the same time

levying upon plaintiffs, with their larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiffs the equal protection of the law in that, in practical effect, it operates to impose upon plaintiffs a grossly excessive and disporportionate burden of the taxes levied under said Act, merely because of the larger volume of plaintiffs' gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, competitors of the plaintiffs engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(6) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act unjustly and unreasonably discriminates against plaintiff and other retail merchants similarly situated, because, in its actual [fol. 143] operation and effect, said challenged Act exempts from its burdens a vast number of competing retail merchants doing business in Kentucky, in that this plaintiff, upon its gross retail sales, which aggregate for the taxable portion of the year 1930 $1,854,174.23, is subjected by said Act to a tax of $11,591.74 less credits aggregating $1499.54, or a minimum tax exacted of this plaintiff amounting to $10,092.20, while at the same time, out of approximately 25,000 retail stores competing with this plaintiff, doing business in Kentucky and having an annual volume of gross retail sales in Kentucky approximating $535,000,000.00, nearly one-third of them are wholly exempted from any tax whatever, and, as shown by the evidence at the hearing of actual returns made to the State Tax Commission, 16,353 retail merchants competing with this plaintiff, who have reported for the taxable period of the year 1930 gross sales

aggregating $247,923,309.00, actually pay in taxes, in the aggregate, only $63,096.66 or less than $3.80 each on the average.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky, in that said Act, in each of the particulars specified in assignments (1) to (6), both inclusive, under this heading II, captioned "Additional Assignments of Errors Committed by the Court in its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

[fol. 144] (8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that, as to taxes claimed of plaintiff on account of sales made in the period between March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of this plaintiff under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respect said challenged Act denies to this plaintiff the guaranty and protection of due process of law afforded to it under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiff prays that each of said decrees herein appealed from, namely, the interlocutory decree and the final decree as hereinbefore set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render

a decree in all respects in accordance with the prayer of plaintiff's bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 145] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages,

[fol. 146] required herein, shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

March 1, 1932.

[fols. 147 & 148] Bond on appeal for $1,000.00, approved and filed March 1, 1932, omitted in printing.

[fols. 149-153] Citation, in usual form, showing service on John B. Lewis et al., omitted in printing.

[fol. 154] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record—Filed March 23, 1932

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. Bill of complaint.
2. Order permitting plaintiff to sue on behalf of all others similarly situated, pursuant to Equity Rule 38.
3. Motion for temporary restraining order.
4. Motion for interlocutory injunction.
5. Temporary restraining order.
6. Order noting appearance of defendants entered by S. H. Brown, Assistant Attorney General, and filing notice

required by Statute to be given to Governor, Attorney General and defendants herein, duly acknowledged.

7. Agreed order that this case be heard with numbers 609 and 610 simultaneously with similar motion in case of Kroger Grocery and Baking Company v. John B. Lewis, et al.

8. Motion of defendants to strike certain allegations of plaintiff's bill of complaint.

9. Motion of defendants to dismiss plaintiff's bill of complaint.

[fol. 155] 10. Answer of defendants.

11. Stipulation (filed herewith) that same evidence read in the case of Stewart Dry Goods Company v. John B. Lewis, et al., upon the motion for interlocutory injunction was read in this case and that said evidence reduced to narrative form and printed in the said Stewart Dry Goods Company record may be read in this case.

12. Order reading affidavits and other evidence and submitting the case.

13. Opinion of the Court.

14. Order and decree denying interlocutory injunction, and dismissing bill of complaint and continuing temporary restraining order in effect pending appeal upon the giving of bond, entered on December 9th, 1931.

15. Order filing and approving bonds entered January 7th, 1931.

16. Stipulation of parties noting J. Dan Talbott as Auditor of Public Accounts succeeding the defendant, Clell Coleman.

17. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

18. Petition for appeal.

19. Assignment of errors.

20. Order allowing appeal.

21. Appeal bond.

22. Citation and endorsement of accepted service thereon.

23. This stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 156] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 157] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT—Filed April 9, 1932

Appellant seeks the reversal of two distinct portions of the order and decree appealed from, namely:

(1) The order dismissing its Bill of Complaint upon the ground that it has an adequate remedy at law.

(2) The order denying its motion for an interlocutory injunction on the same ground.

The points relied on are stated separately and serially under the following headings:

I

Dismissal of Bill of Complaint

Federal jurisdiction clearly exists, and in the Federal Court this cause is essentially one of equitable jurisdiction, for the following reasons:

(1) The appellant is wholly without a remedy at law that is plain or adequate or complete within the meaning of Section 267, Judicial Code (now U. S. Code, Title 28, § 384), as expounded by judicial decisions.

[fol. 158] (2) There is no remedy whatever at law available to appellant in the Federal Courts.

(3) The Commonwealth of Kentucky has not waived its immunity from suit in any court. It has not consented to be sued, directly or indirectly, in any Federal Court, or waived immunity from suit therein.

(4) No money judgment for the recovery of taxes illegally exacted of appellant under the challenged Act can

be recovered against the Commonwealth of Kentucky or any representative of it in any action brought pursuant to the terms of the challenged Act or any other law of Kentucky. The only remedy provided in such case, by any law of Kentucky, is a proceeding against the Auditor of Public Accounts by way of mandamus to compel him to draw his warrant upon the Treasurer in favor of appellant for the amount of appellant's claim when ascertained. No action by appellant for any such remedy or relief can be maintained at law in any Federal Court, and the laws of Kentucky restrict to its own courts any such remedy afforded thereby.

(5) Any such warrant upon the Treasurer eventually issued or delivered to appellant under any proceedings at law by it in either State or Federal Court is without right of priority in payment over any other warrants and is restricted to payment out of any moneys remaining in the General Fund after warrants against such Fund previously issued or preferentially handled by the Treasurer shall have been paid.

The taxes illegally exacted of appellant do not go into the General Fund at all, but are exclusively appropriated to other purposes. The General Fund of the State is not augmented thereby.

(6) Claims upon the General Fund are several years in arrears in the matter of payment; consequently any such [fol. 159] remedy at law provided by the challenged Act or by any other Kentucky statute is wholly inadequate. In order for the holder of any such warrants to realize anything on account thereof, it is necessary to hawk them about in an effort to find a purchaser, and to sell them at a substantial discount if a purchaser can be found.

(7) This suit is a class suit brought pursuant to Federal Equity Rule No. 38, as shown by the Court's order entered of record when this suit was brought. It is properly brought in equity to avoid a multiplicity of actions because of its common or general interest to a large number of taxpayers in the same situation as appellant, and also because an overwhelming number of actions by separate taxpayers for successive years would otherwise result. Moreover, equity jurisdiction exists because of the drastic penalties provided by the challenged Act.

II

Denial of Interlocutory Injunction

The points stated under heading I are likewise relied upon under this heading II. For the sake of brevity they are not here repeated.

In addition thereto, appellant relies upon the following points in support of its appeal from the order denying its motion for an interlocutory injunction.

(1) The court below should have granted an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided in due course upon its merits. (Assignments of Errors II-1.)

(2) The challenged Act designedly denies to appellant and to other retail merchants similarly situated the equal [fol. 160] protection of the laws, by reason of its classifications prescribed in Section 2 thereof, and by reason of its exemptions and credits or deductions provided in Section 4 thereof, and by reason of the consequent widely varying rates of taxation imposed thereby, all of which clearly and designedly effect an unjust, unreasonable and arbitrary discrimination against appellant and other retail merchants having a large volume of annual gross retail sales, in favor of retail merchants who have a smaller volume of gross annual retail sales. (Assignments of Errors II-2, 3, 4, 5, 6.)

(3) The classifications prescribed in Section 2 of the challenged Act, and the exemptions and credits or deductions prescribed in Section 4 thereof, do not rest upon any reasonable basis or have any reasonable relation to the subject-matter of the Act, and they were prescribed for the express purpose of discriminating unjustly and unreasonably against appellant and other taxpayers similarly situated and denying to it and them the equal protection of the laws. (Assignments of Errors II-2, 3, 4, 5, 6.)

(4) The challenged Act is void under the Constitution of Kentucky in that it violates the fundamental principles of uniformity therein prescribed, which require that classification in the matter of taxation levied upon occupations,

persons or property must rest upon some reasonable basis. (Assignments of Errors II-7.)

(5) The challenged Act is void under Section 55 of the Constitution of Kentucky insofar as it seeks to levy upon appellant taxes on account of sales made by it in the period between March 17, 1930, and June 17, 1930, because under Section 55 of the Kentucky Constitution the challenged Act could not and did not properly become operative or effective for any purpose until June 17, 1930.

In this respect, the challenged Act also violates the Due [fols. 161 & 162] Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Errors II-8.)

III

A more detailed statement of the points above digested and relied upon is contained in the Assignments of Errors, to which reference is made for further particulars.

Robert S. Marx, Cincinnati, O.; Frank E. Wood, Cincinnati, O.; Harry Kasfir, Cincinnati, O.; John C. Doolan, Louisville, Ky.; James W. Stites, Louisville, Ky., Solicitors for Appellant.

Service of a copy of the above list of points to be relied upon by Appellant in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fols. 163 & 164] In Supreme Court of the United States

Statement of Portion of Record to be Printed by Clerk

Appellant by counsel states that the entire record as filed on appeal herein is, in appellant's opinion, necessary

for the consideration thereof. The Clerk is accordingly directed to print the entire record in the manner prescribed by paragraph 9 of Rule 13.

Robert S. Marx, Frank E. Wood, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors for Appellant.

Service of notice of the above direction to the Clerk in the matter of printing the record on appeal is hereby acknowledged on behalf of the appellees.

Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 165] [File endorsement omitted.]

Endorsed on cover: File No. 36,644. W. Kentucky, D. C. U. S. Term No. 29. J. C. Penney Company, appellant, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,644.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 30

KROGER GROCERY & BAKING COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

(36,645)

(36,645)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 30

KROGER GROCERY & BAKING COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

THE KROGER GROCERY & BAKING COMPANY, a Corporation Duly Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Dec. 27, 1930

To the Honorable Judge of the District Court of the United States for the Eastern District of Kentucky:

The Kroger Grocery & Baking Company, an Ohio corporation, and a citizen and resident of the State of Ohio, suing on behalf of itself and all other persons, firms, corporations and associations similarly situated, brings this, its Bill of Complaint, against the defendants, John B. [fol. 5] Lewis, Selden Glenn and Henry M. Cline as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and each of them; all of said defendants being citizens and residents of the Commonwealth of Kentucky; said defendants, Henry M. Cline and Clell Coleman residing in the Eastern District thereof, and said defendants John B. Lewis and Selden R. Glenn residing in the Western District thereof.

1. The plaintiff was, at all of the times hereinafter mentioned, ever since has been, and is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, with its principal office and place of business in the City of Cincinnati, Hamilton County, Ohio, and is a citizen and resident of the State of Ohio. The plain-

tiff has continuously complied with all of the laws of the Commonwealth of Kentucky relating to foreign corporations and is authorized to do and is doing business in said Commonwealth.

2. The defendants, John B. Lewis, Selden Glenn, and Henry M. Cline, are the duly and legally appointed, qualified, and acting members of the State Tax Commission of the Commonwealth of Kentucky, which is a commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky, and which commission has been in existence, in pursuance of law, for many years continuously last past. Said individual defendants last named are the only members of said State Tax Commission. Under and by virtue of the terms of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky at the session for the year 1930 (Chapter 149, Acts of 1930, Pages 475-482), the State Tax Commission is charged with [fol. 6] the duty of preparing blank forms for, and ascertaining information from, certain retail merchants operating stores as defined in said Act, and of determining the tax due from said retail merchants, and of employing clerical and other assistance to carry out said Act, and generally to administer and enforce the provisions thereof.

Clell Coleman, one of the defendants herein, is the duly elected, qualified and acting Auditor of Public Accounts of Kentucky, and is charged under said Act with the duty of collecting and disbursing the taxes levied and assessed under the terms of and pursuant to said Act.

3. The amount in controversy in this cause exceeds the sum or value of Three Thousand Dollars, exclusive of interest and costs.

4. This is a suit of a civil nature in equity, and is brought for the purpose of enjoining the defendants from enforcing or attempting to enforce, an Act of the General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; de-

claring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

Said Act is known as House Bill No. 111, and was read, passed, enrolled and signed under the title:

"H. B. 111. An act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

[fol. 7] 5. The plaintiff, for more than twenty-five years continuously last past, has been engaged in the Commonwealth of Kentucky, and in other states of the United States, in the business of selling at retail, groceries, fruits, vegetables, poultry, meats, milk, butter, cheese, eggs and other food, meats and dairy products and goods commonly sold in grocery and meat stores.

In the course of such business, the plaintiff is engaged in interstate commerce in that a substantial portion of the above mentioned foodstuffs and merchandise is bought or purchased by the plaintiff in other states of the United States and is shipped to plaintiff into the Commonwealth of Kentucky, and is sold by plaintiff at retail, and in many cases in the original containers and packages. The plaintiff in the course of such business raises and produces on farms operated by the plaintiff in the State of Ohio a portion of the garden and farm products sold in said stores in Kentucky, including beef, veal, pork, lamb, mutton, poultry, eggs, potatoes and various dairy, meat and garden products, which are processed in plants owned and operated by the plaintiff in the State of Ohio and are then shipped and transported into the Commonwealth of Kentucky, where said garden and farm products are sold at retail by the plaintiff in its stores in the Commonwealth of Kentucky, and plaintiff is actually engaged in gardening and farming in the State of Ohio, and in selling garden and farm products in the Commonwealth of Kentucky.

The plaintiff, long prior to and at the time of the enactment of said statute, was the owner of a large number of retail grocery stores in the Commonwealth of Kentucky, and is now the owner of Two Hundred and Sixty-Three retail grocery stores in said Commonwealth, all of which [fol. 8] are operated and maintained in separate locations

in various, numerous, different, and frequently widely separated parts of said state. Each of said stores is in charge of a local store manager. All of said stores are subject to different competitive conditions depending upon the type of store, the character of competition, the locality, and numerous other factors which make each store a separate retail store, but all of said stores are owned, operated and controlled by plaintiff.

For many years last past the plaintiff has invested its capital in its said business in the Commonwealth of Kentucky, in warehouses, stores, leaseholds, fixtures, merchandise and other property, having a total value in excess of One Million Five Hundred Thousand Dollars, and plaintiff has been for many years last past, and is, a taxpayer in the Commonwealth of Kentucky, paying large sums for license, occupational, personal and real property taxes, and has paid for preceding years all taxes levied by the State, Counties and Municipalities in which its stores are situated, the same as other store owners and taxpayers similarly situated.

During the calendar year of 1929, the total gross retail sales of the plaintiff in all of said stores in the Commonwealth of Kentucky were $13,807,820.00, and for the calendar year of 1930 it is estimated that said sales have been approximately $12,000,000.00, the exact amount not being possible of immediate ascertainment at this time. The annual sales of each store for the calendar year 1929 averaged $51,468.00 per store. The average sales of each store for the year 1930 approximate $50,000.00 for each store. The gross sales by plaintiff during the period from March 17, 1930, to date have been in excess of $10,000,000.00.

[fol. 9] There is in each of the localities where the stores of plaintiff are situated, a large number of individuals, copartnerships and corporations engaged in business in said localities in Kentucky, which own and operate one store carrying on a business similar to that carried on by plaintiff, under similar circumstances, and doing a very much larger volume of business, and having larger gross retail sales than the store owned by the plaintiff which directly competes therewith. The plaintiff in its stores carries on business in every way exactly as business is carried on in stores which are separately owned by one individual, copartnership or corporation. The plaintiff deals in the

same character of articles and merchandise, and sells to the same public, and plaintiff's business is distinguishable from that of a person, co-partnership or corporation operating only one store, in no way whatsoever, except that in plaintiff's case, the plaintiff owns more than one store, while in the case of such others, the owner owns and operates but one store.

The ownership of more than one store in separate and distinct locations does not increase the fire hazard, injure the health and morals of the community, or require increased or additional public protection.

6. There is a large number of persons, firms, corporations, associations, and co-partnerships, foreign and domestic, lawfully engaged in the operation of more than one store or more than one separate or distinct department under the same management, for the sale of goods, wares and merchandise at retail in the Commonwealth of Kentucky, who are in a like situation with plaintiff. The owners of said stores are too numerous to join in this action, and plaintiff prosecutes this case on its own behalf, and on [fol. 10] behalf of all other individuals, firms, associations, co-partnerships and corporations who are at the time engaged in the operation of two or more stores and two or more separate distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff and such other individuals, firms, associations, co-partnerships and corporation, owning or operating two or more stores and two or more separate distinct departments, under one management, and others similarly situated with the plaintiff, in the Commonwealth of Kentucky.

The question of the invalidity of said statute is one of common and general interest to all of said class of persons within the meaning of Equity Rule No. 38.

7. The General Assembly of Kentucky at its 1930 session, enacted House Bill No. 111 (Chapter 149, Acts of 1930, pages 475-482), which was approved by the Governor and purported to become effective March 17, 1930. Said Act was and is in words and figures as follows, to-wit:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words

'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, associa- [fol. 11] tion, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand (Four hundred thousand Dollars) Dollars or less: two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand (Four hundred thousand dollars) Dollars and not exceeding Five hundred thousand (Five hundred thousand dollars) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand (Five hundred thousand dollars) Dollars, and not exceeding Six hundred thousand (Six hundred thousand dollars) Dollars; eight twentieths of one

per cent on the excess of the gross sales over Six hundred thousand (Six hundred thousand dollars) Dollars, and not exceeding Seven hundred thousand (Seven hundred thou-
[fol. 12] sand dollars) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand (Seven hundred thousand dollars) Dollars and not exceeding Eight hundred thousand (Eight hundred thousand dollars) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand (Eight hundred thousand dollars) Dollars and not exceeding Nine hundred thousand (Nine hundred thousand dollars) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand (Nine hundred thousand dollars) Dollars, and not exceeding One million (One million dollars) Dollars; one per cent on the excess of the gross sales over one million (One million dollars) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission, from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascer-
[fol. 13] tain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the

duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, One thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one. One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue [fol. 14] agent's proceedings under Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it,

is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications [fol. 15] herein required to be made, shall be confidential, and any person divulging such information shall be guilty of misdemeanor and upon conviction shall be fined not exceeding Five hundred (Five hundred dollars) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of the State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records,

papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of misdemeanor, and upon conviction shall be fined not exceeding One thousand (One thousand dollars) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section Five of this Act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions [fol. 16] of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the

duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected with-[fol. 17] out affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor."

8. Said Act was deliberately designed and intended to, and in practical operation and effect said Act does, destroy, oppress, prohibit, restrain and arbitrarily discriminate against the lawful business of the owners of two or more retail stores, and the owners of two or more separate departments under one management.

Said design and intent was set forth in the title of said Bill as introduced and read in the House of Representatives of the General Assembly of Kentucky, to-wit:

"H. B. No. 111, An Act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Said bill, as enacted, was read only by the aforesaid title at the time of its second and third reading and passage in said House of Representatives, and said bill was reported by the Committee of Enrollment only by said title, and was thereupon signed by the Speaker of the House and the President of the Senate of the General Assembly of Kentucky.

[fol. 18] 9. Under and by virtue of the terms of said Act hereinbefore set out, if the same should be held valid, the plaintiff in order to conduct its lawful business, and to open, establish, operate or maintain any store or stores in the State of Kentucky, would be required to file a written report with the State Tax Commission on or before February 1, 1931, and each year thereafter, of the total gross sales of all its stores for the preceding year ending December 31, and would be required to pay, approximately thirty days thereafter, a license tax on the total gross sales of all its stores without reference to the sales per store, as follows, to-wit:

1/20th of 1% on the first $400,000.00 of sales.....	$200.00 Tax
2/20th of 1% on the next $100,000.00 of sales.....	100.00 Tax
5/20th of 1% on the next $100,000.00 of sales.....	250.00 Tax
8/20th of 1% on the next $100,000.00 of sales.....	400.00 Tax
11/20th of 1% on the next $100,000.00 of sales.....	550.00 Tax
14/20th of 1% on the next $100,000.00 of sales.....	700.00 Tax
17/20th of 1% on the next $100,000.00 of sales.....	850.00 Tax
1% on the excess over $1,000,000.00 of sales.....	$110,000.00 Tax
Total Tax on $12,000,000.00 of sales.....	$113,050.00 Tax

Pursuant to the terms of said statute, plaintiff would be required to pay an annual tax on the gross retail sales of all of its stores combined of nearly One (1%) Percent of every sale, which tax on gross sales of $12,000,000.00 would equal $113,050.00.

By Section 5, of said Act, any retail merchant who fails to file the report and pay the tax as required herein, is subject to a penalty of 20% plus 6% interest, with an additional penalty of 20% if collected by proceedings in any court. By Section 7, any retail merchant or any officer, director, trustee or agent, who fails to make the report and

pay the tax prescribed in said Act, in whole or in part, is deemed guilty of a misdemeanor and is subject to a fine of $1,000.00 and to imprisonment in the County Jail, not ex- [fol. 19] ceeding six months, or to both fine and imprisonment, in addition to the penalties imposed in Section 5.

Said Act was declared an emergency measure and became effective March 17, 1930. Section 8 thereof, empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the exemptions hereinafter set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Sections 5, and 7, of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statute of General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other store owners similarly situated.

10. Said Act, hereinbefore set out (Chapter 149, Acts of 1930, Pages 475-482), is unconstitutional, invalid and void for the following reasons and each of them:

[fol. 20] First. Said Act violates the provisons of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff, and all other taxpayers similarly situated, of its and their property without due process of law, and denies to the plaintiff, and all others

similarly situated, the equal protection of the laws in the following particulars:

(a) Said Act is, in effect, a tax measure and has nothing to do with the exercise of the police power of the state. It has no relation to the public health, and public welfare, the public morals, or the public safety. It is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. It is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. No provision is contained in said Act for regulation, supervision or inspection. No standards are prescribed for the conduct of the business subject to said tax. As a tax measure, its operation and effect is not equal or uniform, and the classification made by the terms of the Act is deliberately and designedly oppressive, prohibitory, unreasonable, arbitrary, discriminatory, and in the higher brackets is confiscatory as to the plaintiff and other taxpayers similarly situated.

(b) Although said act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky, the true design, intent, practical operation and actual effect of said Act is to exempt from the payment of said tax practically all of the owners of individual and single unit stores and to impose substantially the entire burden of said tax [fol. 21] upon a small part of the taxpayers, viz: taxpayers owning two or more separate stores and/or two or more separate and distinct departments operated under the same management or ownership and having gross retail sales over four hundred thousand dollars. Section 4 of said Act provides that the license or excise tax levied therein shall not be in lieu of any special state license, excise, occupational or corporation tax due under the provisions of any law now in force, or that may hereafter be enacted. Said Section of said Act, however, provides that any retail merchant, as defined herein, who is liable for and pays any special state license, excise, occupational or corporation license tax, under the laws now in force or hereafter enacted, may take credit on the tax levied under said Act

for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied under said Act. Said credit allowed by the terms of said Act was known at the time of the enactment of said Act to be, and is, sufficient in practically all cases entirely to offset the relatively small tax levied under said Act on sales of retail merchants, as defined herein, which do not exceed four hundred thousand dollars. The tax levied under said Act is only fifty (50¢) Cents per thousand dollars of sales on the first four hundred thousand dollars of gross sales. There are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. The gross retail sales of practically all of said individual or single stores or departments are under one hundred thousand dollars per annum. The result of the credit which said stores are permitted to take for the amount of such special license, excise, occupational [fol. 22] and corporation license taxes paid by them is that substantially all of the retail merchants owning individual or single unit stores or departments will be, and are, and were so intended to be exempt from the payment of any tax under the terms of said Act, and thus, as to them, such special license, excise, occupational and corporation license taxes as are paid by them are levied upon and collected from them in lieu of any license tax provided for by said House Bill 111, enacted as Chapter 149, Session Acts of 1930. In practical effect and operation only retail merchants who own or manage more than one separate store or more than one separate department, and which have gross retail sales in all said stores and departments aggregating in excess of four hundred thousand dollars, will be, and are, subject to taxation under said Act; and such retail merchants are a very small and limited class in the Commonwealth of Kentucky. There is no basis for said exemption and classification created by said Act and said exemption is unjust, unreasonable, discriminatory and arbitrary.

The plaintiff paid, during the year 1929, in the Commonwealth of Kentucky for special state license, excise, occupational and corporation license taxes, under the provi-

sions of laws now in force, the sum of $16,488.50 and has paid approximately the same amount during the year, 1930, being an average of $62.32 for each of its 263 stores. All other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in said special taxes approximately the same sum per store as paid by the plaintiff. The amount of special taxes so paid is permitted by this Act to be deducted from the amount of taxes assessed under this Act, so that in practical effect and operation a retail merchant having sales of $300,000.00 or less will not be required to pay any taxes under this Act.

[fol. 23] (c) Section 1, of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management. The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments. The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or cooperatively under an association of management. Said Act, by reason of its application to all retail merchants and stores, which are now controlled or held with others by

majority stock ownership, and which are now controlled or directed by one management or association of ultimate [fol. 24] management, is a deprivation of the property rights of the plaintiff and is prohibitive, oppressive, confiscatory, unreasonable and arbitrary and denies to the plaintiff and other taxpayers similarly situated, the equal protection of the laws and deprives it, and others similarly situated of its and their property without due process of law.

(d) The classification made as a basis for the tax imposed rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of two or more stores or separate and distinct departments, and unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred [fol. 25] thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional

Two Hundred and Fifty Dollars; for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other tax payers similarly situated.

(e) The grocery stores owned by the plaintiff are in [fol. 26] direct, open and free competition, in each and every locality where said stores are located, with a number of other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Said singly or individually owned grocery stores in many of the localities in which the stores of the plaintiff are located, although singly or individually owned, are members of large co-operative organizations or associations for the purpose of co-operative buying, advertising and efficient merchandising. Said competitive stores, by reason of membership in said co-operative associations or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or

co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for newspaper display, store and other advertising co-operatively and upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky [fol. 27] joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, said competitive stores are given undue and unfair economic advantages over the stores of the plaintiff and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff at the expense of the plaintiff.

The average gross sales of the grocery stores owned by the plaintiff in the Commonwealth of Kentucky during the year last past, were approximately fifty thousand dollars per store, as heretofore set forth. The average sales of the grocery stores with which the stores of the plaintiff are in direct, free and open competition, under similar circumstances, will not exceed, except in a relatively few cases, said average sales of the stores owned by the plaintiff in Kentucky. Said individually or singly owned stores, having gross retail sales averaging fifty thousand dollars per store, are only subject under the terms of said Act to a

maximum tax of one-twentieth of one per cent, i. e., Twenty-five Dollars, which amount will be, in practically all cases, entirely offset by the credit of other taxes permitted under Section 4 of said Act, as heretofore set forth. While said stores with which the plaintiff is in competition as aforesaid will not be subject to any tax under the provisions of said Act, or at most, to a tax of Twenty-five Dollars per store, the plaintiff will be required to aggregate for the purposes of taxation the gross retail sales of all its said stores, amounting during the year last past to something in excess [fol. 28] of twelve million dollars and will thereby be required to pay a tax of something in excess of Four Hundred and twenty-nine dollars per store. The result of the operation and effect of said tax practically exempts from taxation the competitors of the plaintiff and requires the plaintiff to pay an excessive prohibitory, oppressive and confiscatory tax in addition to all other taxes on its said stores, and therefore denies to the plaintiff the equal protection of the laws, takes its property without due process of law and its effect upon the plaintiff and other tax payers similarly situated is unjust, unequal, discriminatory and arbitrary.

(f) The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales, It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of

[fol. 29] taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a materially and substantially different rate and basis than the dollar of sales of retail merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of Fifteen Hundred Dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

The Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz., the operation of a store, to continue to engage in such business and to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power and said Act imposes heavy penalties upon the person or corporation failing to make the reports and to pay the tax prescribed therein, and obedience is thus coerced to an invalid law by [fol. 30] excessive and drastic penalties.

(h) The General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores engaged in a lawful business to pay a tax as a condition precedent to the continuance of that business where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and else-

where in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the grocery business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for the plaintiff to meet such competition and to conform its practice and methods of retail merchandising, selling and distribution to the accepted standards for the efficient and successful conduct of such business. In conformity therewith, the plaintiff has built up and developed in the Commonwealth of Kentucky and elsewhere a large and valuable business, upon the basis of selling meats, groceries, and other articles at retail to the [fol. 31] public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon its invested capital employed in the conduct of its business. Such merchandising methods are the basis of the business of the plaintiff, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff a large and valuable good will and a large sales volume. The profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price and to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent on its gross sales and the plaintiff has actually sustained a loss of seventy-six one-hundredths of one per cent on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, and will sustain a similar or greater loss in the calendar year 1930.

Said Act, by levying a so-called excise or license tax, amounting to practically one per cent on all gross sales made by the plaintiff, and others similarly situated, in practical operation and effect, makes it impossible for the plaintiff to continue the operation of its lawful business within

the Commonwealth of Kentucky at a profit and confiscates under the guise of taxation from one-half to two-thirds of any possible profit arising from sales made by the plaintiff in the Commonwealth of Kentucky. By reason of its ownership of warehouses and stores, frequently under long term leases, and its investments in improvements to leaseholds, fixtures and other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice and at a tremendous loss of all of said property, and without losing the value of its good will built up by the [fol. 32] expenditure of vast sums of money, through a period of many years, and without subjecting itself to liability amounting to many thousands of dollars. In consequence of the foregoing facts, said tax as applied to the plaintiff and others similarly situated, is prohibitory and confiscatory and in practical effect and operation is destructive of and takes the property of the plaintiff without any process of law.

(j) Said Act imposes an arbitrary and illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have developed and built up their business in reliance upon a large sales volume and a small average profit therefrom instead of a larger profit from a smaller volume of business and arbitrarily increases the rate of taxation against such merchants.

Second. Said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgment of the privileges and immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the following particulars:

(a) Said Act in its provisions is partial, unreasonable, arbitrary and unequal.

(b) The classification fixed by said law rests upon no sound or reasonable basis, but is wholly arbitrary.

(c) Said Act requires the plaintiff and other persons, co-partnerships and corporations engaged in a lawful business; to-wit, the operation of two or more stores, to pay a license or excise tax as a condition precedent to continuing in said business although said Act was not passed in the exercise of the police power but is purely a tax measure.

[fol. 33] (d) The tax fees required to be paid under the terms and provisions of said Act are unequal and discriminatory, based upon a classification that is wholly arbitrary and unjust, and discriminates against the owners and operators of two or more stores, and/or two or more separate and distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, co-partnerships and associations owning and operating but a single store or department and/or having sales of four hundred thousand dollars or less.

(e) Said Act is unequal and discriminatory in that said Act discriminates between retail merchants who engage in gardening or farming and sell garden or farm products raised by them in the Commonwealth of Kentucky, and retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class and are similarly engaged in the retail trade of selling garden or farm products.

(f) Said Act unequally, unjustly, unreasonably and arbitrarily discriminates in favor of, and excepts from the operation thereof, all retail merchants who actually engage in gardening or farming and selling garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming and/or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Said Act violates the provisions of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and is an attempt, substantially, to burden and inter-
[fol. 34] fere with and regulate interstate trade and commerce, and to levy and impose a tax upon the importation of farm and garden products raised and grown outside of the Commonwealth of Kentucky into the Commonwealth of Kentucky for sale in stores therein, in the following particulars:

(a) Section 1 excepts from the operation of said Act, and from the payment of any tax, those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky. Said Act by its terms, pur-

ports to include as retail merchants and to tax the gross sales of all retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, and who do not actually engage in gardening or farming, and the sale of garden or farm products raised and grown in the Commonwealth of Kentucky. The plaintiff is actually engaged in farming in the State of Ohio, and raises and produces on farms in said state various meat, garden and dairy products, which are subsequently processed in the plants of the plaintiff in the State of Ohio, and are shipped and transported from Ohio to Kentucky, and are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. The plaintiff also purchases from farmers and gardeners in various states of the United States large quantities of garden and farm products which are shipped and transported from said states to the plaintiff in the Commonwealth of Kentucky, and are there sold in stores operated by the plaintiff in said state. A number of the competitors of the plaintiff are actually engaged in gardening or farming and selling such garden and farm products raised by them in the Commonwealth of Kentucky, and are therefore excepted from and not subject to the provisions of said Act [fol. 35] or to the payment of any tax thereunder, whereas the plaintiff is subject to and required to pay the tax provided therein. The provisions of said Act hereinabove set forth, constitute a clear discrimination in favor of gardeners and farmers producing garden and farm products in the Commonwealth of Kentucky against the farmers and gardeners of other states. Said tax is made to depend upon the foreign character of the farm and garden produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—and is therefore an attempt to regulate commerce between the states of the United States. Said tax is imposed upon the sale of farm produce imported from other states and is indirectly an attempt on the part of the Commonwealth of Kentucky to tax the importation of garden, farm and other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Said Act violates fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classifica-

tion, as such principles of uniformity are recognized by Section 171, of the Constitution of the State of Kentucky providing that taxes shall be levied and collected for public purposes only, and shall be uniform on all property of the same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars:

(a) Said Act, in its nature and effect, is a tax measure and provides for a rate of assessment and taxation which is not uniform and which requires different property owners of the same class, to-wit: retail merchants, similarly situated, to pay an unequal rate of assessment and taxation. [fol. 36] The plaintiff, because of the fact that it owns and operates 263 stores in the Commonwealth of Kentucky will be required to pay a rate of taxation on its sales per store approximately twenty times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in the Commonwealth of Kentucky owning and operating a single competitive store. In actual operation and effect, the credit of the operator of a single grocery store will offset the nominal tax, so that said owner of a single competitive store will not pay any taxes per store, whereas the plaintiff will be required to pay more than $429.00 per store.

(b) Retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, but said taxes are increased upward so that the proportionate increase has no relationship whatsoever to the increase of sales, and increased sales are taxed at an arbitrary and capricious rate, disproportionately and unequally.

(c) Although purporting to tax all retail merchants, said Act, in actual operation and effect, was designed, intended and does single out a limited class of retail merchants, to-wit: those owning two or more stores, and two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores and departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all of said sales when so combined and aggregated, places substantially the entire

burden of said tax upon said limited class, and brings said class under the highest brackets of said tax.

[fol. 37] Fifth. Said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations and professions, in the following particulars:

(a) Said section as construed by the Court of Appeals of Kentucky, does not authorize the levying of prohibitory, oppressive, burdensome and arbitrary taxes, which prohibit, oppress and unreasonably burden lawful business. Said Act was designed and intended to and in actual operation and effect will prohibit, oppress and unreasonably burden the business of plaintiff and others similarly situated.

(b) Said Act, under the guise of a license tax would take from the plaintiff and others similarly situated, from one-half to two-thirds of its entire possible profits, and thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon its capital.

10. Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate and complete remedy at law, in each of the following particulars:

(a) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(b) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties pro-
[fol. 38] vided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof plaintiff, and others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage.

(c) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(e) Said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for the recovery of any tax paid by it under protest, but plainly attempts to prohibit any remedy whatever in the courts of the United States, and no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States. In [fol. 39] consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(f) If, in the event plaintiff was successful in obtaining a judgment for the recovery of such tax paid under protest, the Auditor of Public Accounts did not issue his warrant on the Treasury of the Commonwealth of Kentucky for the amount of such tax and interest as provided in said Act, the courts of the United States would not have jurisdiction of an action in mandamus to require the Auditor to issue said warrant and by reason thereof, the plaintiff does not have a plain, adequate and complete remedy at law in the courts of the United States.

(g) Section 9, of said Act, provides that all of the taxes received thereunder shall be divided and that one-half shall [fol. 40] be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said Board, and that the remaining one-half shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth. Should the plaintiff, and others similarly situated, be successful in obtaining a judgment for the recovery of any taxes paid under protest, no provision is made for the payment of said judgment in money, but the remedy of the plaintiff in such event would be limited under Section 10, of said Act, and possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said tax, with legal interest thereon from the date of payment, which warrant by the provisions of said Act is made payable only out of the general fund of the State. Said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky, but one-half to the Board of Charities and Corrections and one-half to liquidate the public indebtedness as aforesaid, and plaintiff is informed and believes, and alleges upon information and belief that there are not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem and pay all of said state warrants heretofore

and hereafter to be drawn on said fund, and that it is the practice and procedure of the Treasurer of the Commonwealth of Kentucky, to redeem and pay said warrants in the order in which the same are issued and that said warrants are for this and other reasons, not readily redeemable, saleable or bankable immediately for their face value, and are subject to [fol. 41] delay in payment. Wherefore, the plaintiff would be unable to obtain full, adequate and complete relief in an action at law, and whether it would be able to obtain a return of any taxes illegally paid under said Act would be dependent upon the condition of said general fund at the time thereof, and what, if any appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto and therefor.

(h) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) The amount of said tax which the plaintiff would be required to pay under the terms of said Act will be in excess of $113,000.00, which is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will substantially decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law.

(j) Section 6 of said Act authorizes the State Tax Commission to have an attachment against the property of the defendant, including garnishees, without the execution of a bond, upon the filing of an affidavit showing the nature of the [fol. 42] claim, that it is just, the sum which the defendant, the State Tax Commission, believes it ought to recover, and that the collection will be endangered by delay in obtaining judgment. The enforcement of such drastic provisions and the other provisions of said Act against the plaintiff, and others similarly situated, will result in a substantial diminu-

tion of the value of the property employed by them respectively in their business, which loss will be large in amount, and will substantially decrease the amount of annual business done by them respectively, but which amount cannot be measured by any damages.

(k) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed by the State and Federal Constitutions.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of the Act of the Kentucky Legislature hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of [fol. 43] House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, Pages 475-482); directly or indirectly from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants, or employees, or any person, firm or corporation similarly situ-

ated in the Commonwealth of Kentucky, and their agents, servants and employees, for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky, passed at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482), entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States [fol. 44] and that of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Kentucky, Solicitors for Plaintiff.

Duly sworn to by Albert H. Morrill. Jurat omitted in printing.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Jan. 10, 1931

The plaintiff in the above entitled cause hereby applies to the Court for an interlocutory injunction, as prayed for in its Bill of Complaint, suspending restraining and enjoining the enforcement, operation and execution of House Bill No. 111, enacted by the General Assembly of Kentucky, at its

session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, and restraining and enjoining the defendants and the action of any officer of the State of Kentucky in the enforcement and execution of such statute and in the enforcement or execution of any order made by any administrative Board of Commission acting under and pursuant to such statute against the plaintiff and all others similarly situated.

And the plaintiff requests that its application for an interlocutory injunction be heard before three Judges, as prescribed in such case made and provided, and that said interlocutory injunction continue in force until the final hearing herein.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiff.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed Jan. 12, 1931

Now comes the plaintiff in the above entitled cause and represents to the Court that irreparable loss and damage will result to the Complainant unless a temporary restraining order is granted by this Honorable Court, restraining the enforcement, operation or execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, being Chapter 149, Acts of 1930, pages 475-482, and the enforcement or execution of such statute or any order made by any Board or Commission acting thereunder, until the hearing and determination of the application for an Interlocutory Injunction, as prayed for in the Bill of Complaint.

Wherefore, the plaintiff moves the Court for a temporary restraining order, suspending, restraining and enjoining the enforcement, operation and execution of said enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, being Chapter 149, Acts of 1930, pages 475-

482, and the enforcement or execution of such statute or of any order made by any administrative Board or Commission acting under and pursuant to such statute, until the hearing and determination of the application of the plain-
[fols. 47-49] tiff for an interlocutory injunction, as heretofore applied for in the Bill of Complaint and by Motion duly made herein.

Trabue, Doolan, Helm & Helm, Nichols, Morrill, Wood, Marx & Ginter.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE JUDGE COURT—Filed Jan. 20, 1931

This is an application for interlocutory injunction restraining the defendants in the above named cause from enforcing a statute of the State of Kentucky. The application seeks both an interlocutory injunction and a final order adjudging and decreeing that said statute is unconstitutional and void under the several Articles of the Constitution of the United States.

It appearing therefore that under the provisions of Title 28, Section 380, U. S. C. A. Judicial Court, Section 266, this application and cause should be heard by a Court consisting of three Judges as is provided in the statute governing the procedure in such cases.

Now, therefore, it is ordered this 20 day of January, 1931, that Honorable Arthur C. Denison, United States Circuit Judge and Honorable Charles I. Dawson, United States District Judge be and they hereby are called to my assistance to hear and determine the said application for an interlocutory injunction and for final decree.

It is further ordered that this cause be set for hearing before the Court as constituted on the 7th day of February, [fol. 51] 1931, at 9 A. M. o'clock in the Federal Building in the City of Covington, State of Kentucky.

A. M. J. Cochran, Judge.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Jan. 29, 1931

This cause came on to be heard before me on the verified Bill of Complaint of plaintiff, The Kroger Grocery & Baking Company, an Ohio corporation, suing for itself and for all others similarly situated, alleging that House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, violates and is contrary to the provisions of the Constitution of the United States; and it appearing that said Bill of Complaint prays for an interlocutory injunction restraining the enforcement of said statute and the action of any officer of Kentucky in the enforcement or execution of such statute, and for a temporary restraining order pending the hearing and determination of said application for an interlocutory injunction;

And it further appearing that two Judges having been called to my assistance to hear and determine said application for an interlocutory injunction on the 17th day of January, 1931, at Covington, Kentucky, and at least five (5) days notice of said hearing was given to the Governor and the Attorney General of the Commonwealth of Kentucky, and to the defendants in this cause, as provided by [fol. 53] law.

And the Attorney General of the Commonwealth of Kentucky, on behalf of the defendants herein, having moved for a continuance of said hearing and the Court having granted said motion, set the hearing of said application for an interlocutory injunction before said Court of three Judges for the 7th day of February, 1931 at 9:00 A. M. o'clock, at Covington, Kentucky;

Whereupon, the plaintiff having moved for a temporary restraining order pending the hearing and determination of its application for an interlocutory injunction and due notice thereof having been given to the defendants and the same having been submitted to the Court; Now, therefore, the Court finds and is of the opinion that irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted restraining the enforcement of

said statute and the action of any officer of the Commonwealth of Kentucky in the enforcement or execution thereof until the hearing and determination of the application for an interlocutory injunction and that said statute, which is alleged to be unconstitutional, as aforesaid, purports to become effective on February 1, 1931, and that the plaintiff would thereupon be subject to the provisions and penalties thereof and that the defendants are now expending and are about to expend large sums thereunder and will immediately enforce said statute unless restrained and enjoined, all to the irreparable loss and damage of the Complainant and all others subject thereto;

Wherefore, it is ordered, adjudged and decreed that a temporary restraining order issue, suspending, restraining and enjoining the enforcement, operation and execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and [fols. 54-56] known as Chapter 149, Acts of 1930, pages 475-482, bearing the title:

"An act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it enacted by the General Assembly of the Commonwealth of Kentucky."

And restraining and enjoining the defendants, John B. Lewis, Selden Glenn, Henry M. Cline and Clell Coleman, and each of them, and any officer of the Commonwealth of Kentucky, their agents, servants, employees and attorneys, from enforcing or executing such statute and from enforcing or executing any order made by any administrative Board or Commission acting thereunder pursuant to such statute, against the plaintiff, The Kroger Grocery & Baking Company, and any other person, firm, corporation, association and co-partnership operating chain stores in the state until February 7th and it can be so determined by the three Judges whether it shall be continued pending the hearing and determination of the application for the interlocutory injunction and that the plaintiff enter into a bond,

payable to the Commonwealth of Kentucky, in the amount of Five Thousand ($5,000.00) Dollars, conditioned according to law.

A. M. J. Cochran, Judge.

Jany 29th, 1931.

[fols. 57-60] In United States District Court

[Title omitted]

Order Permitting Plaintiff to Sue as Representative of Class—Filed Jan. 31, 1931

On motion of plaintiff, based upon its vertified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

A. M. J. Cochran, Judge.

Jany. 31, 1931.

[fols. 61 & 62] In United States District Court

[Title omitted]

Order Continuing Temporary Restraining Order—Filed Feb. 7, 1931

It appearing that one of the Judges called to my assistance to hear and determine the application for an interlocutory injunction in the above cause cannot be present on February 7, 1931, on account of illness, and that it is necessary to continue the hearing of said application by reason thereof, it is therefore ordered and adjudged that the hearing of said application for an interlocutory injunc-

tion be continued to February 14, 1931, and that said application shall be heard on said date at Covington, Kentucky.

And it is further ordered and adjudged that the temporary restraining order, heretofore entered and issued in this cause on the 29th day of January, 1931, be and the same hereby is continued in full force and effect until the hearing and determination of said application for an interlocutory injunction, as aforesaid.

A. M. J. Cochran, Judge.

February 7, 1931.

[fol. 63] In United States District Court

[Title omitted]

Motion to Dismiss—Filed Feb. 14, 1931

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefor as follows:

(1) Because it appears in the bill of complaint filed in this case that this action is prosecuted for the benefit and on behalf of citizens and residents of this State to-wit: certain domestic firms, co-partnerships and associations, corporations, and therefore no diversity of citizenship exists, as alleged, upon which basis this Court is alleged to have jurisdiction.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the complaint that plaintiff has a plain, adequate and complete remedy at law.

[fol. 64] 4. Because it appears in the bill of complaint that this is in fact an action against a sovereign State, attempted to be prosecuted by citizens of another State in violation of the Eleventh Amendment of the Federal Constitution.

5. Because it appears in the bill of complaint that plaintiff is, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Leslie W. Morris, Solicitor- for Defendants. Batson, Cary & Welch, Howard G. Gentry, of Counsel.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931

Come the defendants, John B. Lewis, Selden Glenn and Henry M. Cline, as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and for their answer to the bill of complaint filed in the above styled action, plead as follows:

1. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 1 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

2. Defendants admit all the allegations contained in Paragraph 2 of the Bill of Complaint.

3. Defendants admit all the allegations contained in Paragraph 3 of the Bill of Complaint.

4. Defendants, for answer to Paragraph 4, deny that this is a suit of civil nature in equity, or is brought for the purpose of enjoining the defendants from enforcing or at-
[fol. 66] tempting to enforce an Act of the General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing

fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

They deny that House Bill No. 111 was read, passed, enrolled or signed under the title:

"H. B. 111. An act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

5. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 5 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

6. Defendants, for answer to Paragraph 6, deny that there is a large or any number of persons, firms, corporations, associations, or co-partnerships, foreign or domestic, lawfully engaged in the operation of one or more stores or more than one separate or distinct department under the same management, for the sale of goods, wares or merchandise at retail in the Commonwealth of Kentucky, who are in a like position with plaintiff.

Denies that the owners of said stores are too numerous to join in this action or that plaintiff prosecutes this case on behalf of any other individual, firm, association, co-partnership or corporation, who are at this time engaged in the operation of two or more stores or two or more separate, distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff or such other individuals, firms, associations, co-partnerships or corporations, owning or operating two or more stores or two or [fol. 67] more separate, distinct departments under one management, or others similarly situated with the plaintiff in the Commonwealth of Kentucky.

Denies that the question of the invalidity of said statute is one of common or general interest to any or all of the people of Kentucky within the meaning of Equity Rule No. 38.

7. Defendants admit all the allegations contained in Paragraph 7 of the Bill of Complaint.

8. Defendants, for answer to Paragraph 8, deny that said Act was deliberately designed or intended to, or in practical operation or effect does, destroy, oppress, prohibit, restrain or arbitrarily discriminate against the lawful business of the owners of two or more retail stores, or the owners of two or more separate departments under one management; or that said design or intent was set forth in the title of said bill as introduced or read in the House of Representatives of the General Assembly of Kentucky, to-wit:

"H. B. 111. An Act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Deny that said bill was enacted or read only or at all by the aforesaid title at the time of its second or third reading or passage in the House of Representatives by the Committee of Enrollment, or at all, by said title, or was thereupon signed by the Speaker of the House or the President of the Senate of the General Assembly of Kentucky while containing said alleged title.

9. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 9 of the Bill of Complaint and therefore neither admit or deny the same, but require strict proof thereof.

10. Defendants, for answer to Paragraph 10, deny that said Act (Chapter 149, Acts of 1930, Pages 475-482) is un- [fol. 68] constitutional, invalid or void for the alleged reasons set out in said Bill of Complaint, and hereafter referred to separately, or any of them.

First. Deny that said Act violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff, or other taxpayers similarly situated, of its or their property without due process of law, or denies to the plaintiff, or others similarly situated, the equal protection of the law in the following particulars, or at all:

(a) Deny that said Act is, in effect, a tax measure, or that it has no relation to the police powers of the state; or that it has no relation to the public health, the public welfare, the public morals, or the public safety. Deny that

it is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. Deny that it is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. Deny that no provision is contained in said act for regulation, supervision or inspection; that no standards are prescribed for the conduct of the business subject to said tax; or that as a tax measure, its operation or effect is not equal or uniform; or that the classification made by the terms of the Act is deliberately or designedly, or at all, oppressive, prohibitory, unreasonable, arbitrary, discriminatory, or in the higher brackets, or at all, is confiscatory as to the plaintiff or other taxpayers similarly situated.

(b) Deny that although said Act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming or selling garden or farm products raised by them in Kentucky, the true design, intent, practical operation, or actual effect of said Act is to exempt from the payment of [fol. 69] said tax practically all, or any, of the owners of individual or single unit stores, or to impose substantially the entire burden of said tax upon a small part of the taxpayers, viz: taxpayers owning two or more separate and distinct departments operated under the same management or ownership, or having gross retail sales over four hundred thousand dollars. Defendants deny that the credits for special license, excise, occupational or corporation license tax, allowed by the terms of said Act, were known at the time of the enactment of said Act to be, or are sufficient, in practically all or any cases, entirely to offset the relatively small tax levied on sales of retail merchants which do not exceed four hundred thousand dollars. Deny that there are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. Deny that the gross retail sales of practically all, of any, of said individual or single stores or departments are under one hundred thousand dollars per annum; or that the results of the credit which said stores are permitted to take for the amount of such special license, excise, occupational or corporation li-

cense tax paid by them is that substantially all, or any, of the retail merchants owning individual or single unit stores will be, or are, or were so intended to be exempt from the payment of any tax under the terms of said Act, or thus, as to them, such special license, excise, occupational or corporation license taxes as are paid by them, or are levied upon or collected from them in lieu of any license tax provided for by said House Bill No. 111.

Deny that in practical effect or operation only retail merchants who own or manage more than one separate store or more than one separate department, or which have gross retail sales in all said stores or departments aggregating in excess of four hundred thousand dollars, will be, or are, subject to taxation under said Act, or that said mer-
[fol. 70] chants are a very small or limited class in the Commonwealth of Kentucky. Deny that there is no basis for said exemption or classification created by said Act, or that said exemption is unjust, unreasonable, discriminatory, or arbitrary.

Defendants deny that all, or any, other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in special state license, excise, occupational or corporation license tax approximately the same sum per store as paid by the plaintiff, or that in practical effect or operation a retail merchant having sales of $300,000. or less will not be required to pay any taxes under this Act.

(c) Defendants deny that the design, intent, practical operation or effect of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments are separate or distinct enterprises; without regard to location or without regard to the fact that said stores or departments, are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments. Deny that the design, intent, or practical operation of said Act is thereby to tax, penalize, or, because of

the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize, or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores [fol. 71] under one management or cooperatively under an association of management. Deny that said Act, by reason of its application to all retail merchants or stores, which are now controlled or held with others by majority stock ownership, or which are now controlled or directed by one management or association of ultimate management, is a deprivation of the property rights of the plaintiff or is prohibitive, oppressive, confiscatory, unreasonable or arbitrary or denies to the plaintiff or other taxpayers similarly situated, the equal protection of the laws or deprives it, or others similarly situated, of its or their property without due process of law.

(d) Deny that the classification made as a basis for the tax imposed, rests wholly upon gross retail sales, or that the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000, unequally, disproportionately, arbitrarily or with the sole, or any, design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of two or more stores or separate or distinct departments, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. Deny that the practical operation or effect of said increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on one hundred thousand dollars as a retail merchants whose sales are two hundred thousand dollars, or for the next one hundred thousand dollar increase, said merchant is required to pay an additional two hundred and fifty dollars; or for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of

[fol. 72] increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of one thousand dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Deny that under said act a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of fifty dollars, less his permitted credits, or, the plaintiff is subject to a tax of $1,000 on every one hundred thousand dollar increase in its sales. Deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other taxpayers similarly situated.

(e) Deny that the grocery stores owned by the plaintiff are in direct, open or free competition, in every or each locality where said stores are located, with any other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Deny that the singly or individually owned grocery stores in many, or any, of the localities in which the stores of this plaintiff are located, although singly or individually owned, are members of large cooperative organizations or associations for [fol. 73] the purpose of cooperative buying, advertising or efficient merchandising. Deny that said competitive stores, by reason of membership in said cooperative associations or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or cooperative buying on a large scale, including the pooling of purchasing power, the ability to contract for newspaper

display, store *as* other advertising, cooperatively or upon a large scale, or for the scientific or efficient arrangement of stores, window displays or the development of merchandising methods through the employment cooperatively, of experts or others experienced therein. Deny that said cooperative associations combine cooperatively as great or a greater number of stores or have as great or greater purchasing or buying power, or have as great or greater advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky. Deny that any singly or individually owned stores, or members of cooperative associations of similar circumstances or in direct competition with the plaintiff or other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sale of all stores in Kentucky joined together in the same cooperative association or organization, or hence, said competitive stores members of said association or organization, are not subject to taxation on the same basis, classification or rate as the plaintiff, or are in practical operation or effect practically exempt from any taxation under said act; or that the plaintiff is subject to taxation at the highest rate prescribed in said act; or that by reason thereof, said competitive stores are given undue or unfair economic advantages over the stores of the plaintiff, or are in effect aided, helped or subsidized by said act in their competition with the plaintiff at the expense of the plaintiff.

Deny that the average gross sales of the grocery stores [fol. 74] owned by the plaintiff in Kentucky during the year last past was approximately fifty thousand dollars per store. Deny that the average sales of the grocery stores with which the grocery stores of the plaintiff are in direct free or open competition, under similar, or any, circumstances, will not exceed, except in a relatively few, or any, cases, said average sales of the stores owned by the plaintiff in Kentucky. Deny that individually or singly owned stores will have gross sales averaging only $50,000. per store or will pay a tax of only one twentieth of one percent, i. e. Twenty-five dollars, or that said amount will be in practically all cases entirely offset by the credit of other taxes permitted under Section 4 of said Act. Deny that the stores in competition with the plaintiff will not be sub-

ject to any tax under the provisions of said Act, or at most, to a tax of Twenty-five dollars per store, or that the plaintiff will be required to pay a tax of something in excess of four hundred and twenty-nine dollars per store, or any such amount. Deny that the result of the operation or effect of said tax practically, or at all, exempts from taxation the competitors of the plaintiff, or requires the plaintiff to pay an excessive prohibitory, oppressive or confiscatory tax in addition to all other taxes, or any other taxes, on its said stores or thereby denies to the plaintiff the equal protection of the laws, takes its property without due process of law or its effect upon the plaintiff and other taxpayers similarly situated is unjust, unequal, discriminatory or arbitrary.

(f) Deny that the classification or graduation made as a basis for the tax imposed rests wholly, or at all, upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate man-
[fol. 75] agement; that said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. Deny that it does not rest in any particular upon the income or earnings from any store or stores, or that it has no necessary relation to receipts; that it is imposed regardless of whether said sales are made at a profit or loss, or the amount of profit or loss therefrom; that it has no relation to profits or losses, if any accrue from said sales; that it has no relation to the capital employed or invested. Deny that it does not take into account the type of business. Deny that said Act does not make any provision for the merchandise returned, or for the cancellation of sales or resales of merchandise, or for the net amount of sales, or sales on credits for which payment is not received, or that it classifies sales solely as to gross amount thereof by dollars, or strikes at the increase in said gross sales by a geometrical increase in the rate of taxation; for one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, or the tax thereon is levied or collected at the highest bracket of one per cent.

Deny that said Act purports to classify or tax sales by dollars; or that it taxes the dollar of sales of certain retail

merchants upon a materially or substantially different rate or basis than the dollar of sales of retail merchants engaged in direct competition or similarly circumstanced, or imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, or who is only subject to a tax of two hundred dollars.

Deny that thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half, or any, times as much on his dollar of sales as his competitor, who, in the same or similar cir- [fol. 76] cumstances, is required to pay on his dollar of sales. Deny that said classification is unreasonable, without a rational basis, or is arbitrary, unequal, burdensome, or oppressive.

Deny that the Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz: the operation of a store, to continue to engage in such business or to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power, or said Act imposes heavy penalities upon the person or corporation failing to make the reports or to pay the tax prescribed therein, or obedience is thus, or at all, coerced to an invalid law by excessive or drastic penalties.

(h) Deny that the General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores to pay a tax as a condition precedent to the continuance of that business, where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) Deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky, or elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital.

Deny that the retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales or continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. Deny that the highly competitive character of the grocery business, in which this plaintiff is [fol. 77] engaged, and other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for the plaintiff to meet such competition or to conform its practice or methods of retail merchandising, selling or distribution to the accepted standards for the efficient or successful conduct of such business. Deny that in conformity therewith, the plaintiff has built up or developed in the Commonwealth of Kentucky or elsewhere a large or valuable business, upon the basis of selling meats, groceries or other articles at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales.

Deny that the plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon its invested capital employed in the conduct of its business. Deny that said merchandising methods are the basis of the business of the plaintiff, or are of benefit to the general public of the Commonwealth of Kentucky, or have brought to the plaintiff a large or valuable good will, or a large sales volume. Deny that the profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price, or any other reason, or to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent. on its gross sales, or that the plaintiff has actually sustained a loss of seventy-six one-hundredths of one per cent., or any other amount, on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, or will sustain a similar or greater, or any loss in the calendar year 1930.

Deny that said Act, by levying a so-called excise or license tax, amounting to practically one per cent. on all gross sales made by plaintiff, or others similarly situated, in practical operation or effect, or at all, makes it impossible for the plaintiff to continue the operation of its lawful business [fol. 78] within the Commonwealth of Kentucky at a profit

or confiscates under the guise of taxation, or at all, from one-half to two-thirds of any amount or kind of possible profit arising from sales made by plaintiff in the Commonwealth of Kentucky. Deny that by reason of its ownership of warehouses or stores, frequently under long term leases, or otherwise, or its investments in improvements to leaseholds, fixtures, or other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice, or at a tremendous loss of all, or any, of said property, or without losing the value of its good will, built up by the expenditure of vast sums of money, or otherwise, through a period of many years, or any years, or without subjecting itself to liability to many thousands of dollars, or any amount. Deny that in consequence of the foregoing facts, or at all, said tax as applied to the plaintiff or others similarly situated, is prohibitory or confiscatory, or in practical effect or operation is destructive of, or takes the property of plaintiff without any process of law.

(j) Defendants deny that said Act imposed an arbitrary or illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have built up their business in reliance upon a large sales volume, or a small average profit therefrom instead of a larger profit from a smaller volume of business or arbitrarily increases the rate of taxation against such merchants.

Second. Defendants deny that said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the privileges or immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the folowing particulars, or at all:

(a) Defendants deny that said Act in its provisions is [fol. 79] *is* partial, unreasonable, arbitrary or unequal.

(b) Defendants deny that the classification fixed by law rests upon no sound or reasonable basis, or that it is wholly or at all arbitrary.

(c) Deny that said Act requires the plaintiff or other persons, co-partnerships or corporations engaged in a lawful business, to-wit: the operation of two or more stores, to pay a license or excise tax as a condition precedent to

continuing in said business, or that said Act was not passed in the exercise of the police power, or that it is purely a tax measure.

(d) Deny that the tax fees required to be paid under the terms or provisions of said Act are unequal or discriminatory, based upon a classification that is wholly arbitrary or unjust, or discriminates against the owners or operators of two or more stores or two or more separate or distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, copartnerships or associations owning or operating but a single store or department or having sales of four hundred thousand dollars or less.

(e) Defendants deny that said Act is unequal or discriminatory in that said Act discriminates against retail merchants who engage in gardening or farming or sell garden or farm products raised by them in the Commonwealth of Kentucky, or retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class. Deny that they are all members of the same class, or are similarly engaged in selling at retail garden or farm products.

(f) Defendants deny that said Act unequally, unjustly, unreasonably or arbitrarily, or at all, discriminates in favor of, or excepts from the operation thereof, all, or any, retail merchants who actually engage in gardening or selling [fol. 80] garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming, or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Defendants deny that said Act violates the provisions of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, or that it is an attempt, substantially, or at all, to burden or interfere with or regulate interstate trade or commerce, or to levy or impose a tax upon the importation of farm or garden products raised or grown outside the Commonwealth of Kentucky into the

Commonwealth of Kentucky for sale in stores therein, in the following particulars, or at all:

(a) Defendants deny that Section 1 excepts from the operation of said Act, or from the payment of any tax, those actually engaged in gardening or farming or selling garden or farm products raised by them in Kentucky. Deny that said Act by its terms, purports to include as retail merchants, or to tax the gross sales of all, or any, retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, or who do not actually engage in gardening or farming, or the sale of garden or farm products raised or grown in the Commonwealth of Kentucky. Deny that the plaintiff is actually engaged in farming in the State of Ohio, or raises or produces on farms in said state various meat, garden or dairy products, which are subsequently processed in the plants of plaintiff in the State of Ohio, or are shipped or transported from Ohio to Kentucky, or are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. Deny that the plaintiff purchases from farmers or gardeners in various [fol. 81] states of the United States, or any state, large, or any, quantities of garden or farm products which are shipped or transported from said states to the plaintiff in the Commonwealth of Kentucky, or that said products are sold in stores operated by plaintiff in said State. Deny that a number, or any, of the competitors of the plaintiff are actually engaged in gardening or farming, or selling such garden or farm products raised by them in the Commonwealth of Kentucky, or are therefore excepted from, or not subject to the provisions of said Act, or to the payment of any tax thereunder, or that plaintiff is subject to or required to pay the tax provided therein.

Deny the provisions of said Act constitute a clear, or any, discrimination in favor of gardeners, or farmers producing garden or farm products in the Commonwealth of Kentucky against the farmers or gardeners of other states. Deny that said tax is made to depend upon the foreign character of the garden or farm produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—or is an attempt to regulate commerce between the states of the United States. Deny that said tax

is imposed upon the sale of farm produce imported from other states or is directly, or at all, an attempt by the Commonwealth of Kentucky to tax the importation of garden, farm or other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Defendants deny that said Act violates fundamental principles of uniformity, or any principles of uniformity, in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification, as such principles of uniformity are recognized by Section 171 of the Constitution of the State of Kentucky providing that taxes shall be levied or collected for public purposes only, or shall be uniform on all property of the [fol. 82] same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars, or at all:

(a) Defendants deny that said Act, in its nature or effect, is a tax measure or provides for a rate of assessment or taxation which is not uniform or which requires different property owners of the same class to-wit: retail merchants similarly situated, to pay an unequal rate of assessment or taxation.

Deny that the plaintiff, because of the fact that it owns or operates Two Hundred and Sixty-three stores in the Commonwealth of Kentucky, will be required to pay a rate of taxation on its sales per store approximately twenty, or any, times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in single or competitive store. Deny that said tax is not actually imposed on sales of property owners owning or operating single competitive stores.

Deny that in actual operation or effect, the credit of the operator of a single grocery store will offset the nominal tax, or that said tax is a nominal tax, so that said owner of a single competitive store will not pay any tax per store, or that the plaintiff will be required to pay more than $429.00 per store, or any sum.

(b) Deny that retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, or that said taxes are increased upward so that the proportionate increase has no relation-

ship whatsoever to the increase of sales, or increased sales are taxed at an arbitrary or capricious rate, disproportionately or unequally.

(c) Defendants deny that although purporting to tax all retail merchants, said Act, in actual operation or effect, or at all, was designed, intended or does single out a limited class of retail merchants, to-wit: those owning two or more [fol. 83] stores, or having two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores or departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all said sales when so combined or aggregated, places substantially the entire burden or said tax upon said limited class, or brings said class under the highest brackets of said tax.

Fifth. Defendants deny that said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky, authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations or professions, in the following particulars, or at all:

(a) Deny that said Act was designed or intended to, or in actual operation or effect will prohibit, oppress, or unreasonably burden the business of plaintiff or others similarly situated.

(b) Deny that said Act, under the guise of a license tax, or at all, would take from the plaintiff or others similarly situated, from one-half to two-thirds of its entire possible profits, or any of its possible profits, or thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon the capital.

10. Defendants deny that unless they are restrained or enjoined from enforcing or attempting to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable, or any, losses or injury for which they have no plain, adequate or complete remedy at law, in each of the following particulars, or at al-:

(a) Deny that the plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid

[fol. 84] or unconstitutional enactment, or for which they are not legally liable.

(b) Deny that upon the failure of the plaintiff or others similarly situated, to pay said taxes, that any drastic penalties will be attempted to be enforced by the defendants against the plaintiff, or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes or penalties or criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, or at a great or any expense or damage.

(c) Deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out the provisions of said Act to the irreparable injury or damage, or any injury or damage, of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they would be put to a large, or any, expense for attorneys' fees or court costs, or would be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs, or other expenses, or that plaintiff, or others similarly situated, would be required to expend said funds.

(e) Defendants deny that said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for recovery of any tax paid [fol. 85] by it under protest, or that it plainly, or at all, attempts to prohibit any remedy, or that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States; or that in consequence whereof, or at all, the plain-

tiff, or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that such is the meaning of Section 10 of said challenged Act of 1930, or from Section 162 of the Kentucky Statutes, or that these are the only statutes of the Commonwealth of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer or covered into the Treasury of the State.

(f) Defendants deny that if, in the event plaintiff was successful in obtaining judgment for the recovery of such taxes under protest, the Auditor of Public Accounts did not issue his warrant upon the Treasury of the Commonwealth of Kentucky for the amount of such tax or interest as provided in said Act, the courts of the United States would have no jurisdiction of an action in mandamus to require the Auditor to issue said warrant, or that by reason thereof, [fol. 86] or at all, plaintiff does not have a plain, adequate or complete remedy at law in the courts of the United States.

(g) Defendants deny that if the plaintiff, or others similarly situated, be successful in obtaining a judgment for the recovery of any taxes under protest, that no provision is made for the payment of said judgment in money, or that the remedy of the plaintiff in such event would be limited under Section 10 of said Act, or possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said taxes, with legal interest thereon from the date of payment, or

that said warrant by the provisions of said Act is made payable only out of the general fund of the State. Deny that said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky. Deny that there is not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem or pay all of said state warrants heretofore or hereafter to be drawn on said fund, or that it is the practice or procedure of the Treasurer of the Commonwealth of Kentucky to redeem or pay said warrants in the order in which the same are issued or that said warrants are for this, or other reasons, not readily redeemable, saleable or bankable immediately for their face value or are subject to delay in payment. Deny that the plaintiff would be unable to obtain, full, adequate or complete relief in an action at law, or whether it would be able to obtain a return of any taxes illegally paid under said Act would depend upon the condition of said general fund at the time thereof, or upon what, if any, appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto or therefor.

(h) Deny that said Act is ambiguous or doubtful as to [fol. 87] its application or meaning, or as to the procedure or requirements thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) Defendants deny that the amount of said tax which the plaintiff would be required to pay under the terms of said Act would be in excess of $113,000, or in excess of $80,000, or that said named amount is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, or that such amount is needed by the plaintiff to carry on its business therein. Deny that the payment of such a sum of money would impair the ability of the plaintiff to operate its business in Kentucky, or will substantially decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses, or who are not required to withdraw a proportionate sum therefrom, an unfair or undue

advantage over plaintiff, for which plaintiff has no plain, adequate or complete remedy at law.

(j) Defendants deny that Section 6 of said Act which authorizes the State Tax Commission to have an attachment for the collection of the tax levied under said Act, will result in a substantial or any diminution of the value of the property employed by plaintiff, or others similarly situated, respectively in their business, or that any losses will be large in amount, or that there will be substantial losses, or any losses, or that there will be any substantial, or at all, decrease of amount of annual business done by them respectively, or that such amount, if any, cannot be measured by any damages.

(k) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing all lawful business in which the plaintiff, or others similarly situated, are engaged, or in which they have the undoubted right to [fol. 88] engage, or which is guaranteed by the State or Federal Constitutions.

11. Defendants deny each and every allegation in the Bill of Complaint not herein admitted, controverted or specifically denied.

Further answering, said defendants aver and allege as follows:

1. The Act in question (House Bill 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods at retail in this Commonwealth. Retail merchants are, by the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant" as defined in said Act, includes every person, firm, corporation, association, or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon each merchant doing a given amount of annual gross retail business without regard to whether such merchant operates one store or many stores.

2. The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross retail sales, but also upon the ability of the merchants affected by

the various gradations of the Act to pay the tax imposed, it being a well recognized economic law of merchandising that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants, and especially those engaged in the retail grocery business in this Commonwealth, having gross annual sales of less than $400,000 per annum, as a class, have an average annual income of —% upon their investment, and those merchants engaged in the grocery business having annual gross sales of more than $— and less than $— per year have an average annual income, as a class, of —% on their invested capital, and those retail [fol. 89] merchants engaged in the grocery business in this Commonwealth having sales of more than $1,000,000 per year, and less than $— per year, as a class, have an average annual income of —% on their invested capital, and those retail merchants engaged in the grocery business in this Commonwealth having an annual gross retail sale of $— per year, or over, have, as a class, an income of —% upon their invested capital.

Defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to the volume of sales enjoyed by this plaintiff and others similarly situated.

3. Defendants say that the progressive increase in earning power of invested capital based on increased volume of sales as illustrated in the paragraph above, conclusively proves a proportionate increased ability to pay the tax levied by the Act in question.

4. Defendants further allege that the plaintiff, Kroger Grocery & Baking Company, and all others similarly situated are now enjoying, and have for many years enjoyed a large and prosperous retail business in this State, and that their gross annual retail sales have in many instances exceeded $12,000,000 per annum, and that they are now making, and have made, a profit of more than 3.1% on said annual sales, and that this represents a net income on capital invested in the retail business in this State of more than 17.4%, and that this plaintiff and others similarly situated, after the exaction of the tax imposed by the Act in question,

will still have a net return of more than 13% on their invested capital but this plaintiff, The Kroger Grocery & Baking Company, has due to mismanagement, internal dissention, and certain unsound merchandising practices heretofore followed by it, enjoyed a less return on its invested [fol. 90] capital than others similarly situated.

They say that the return enjoyed by the plaintiff is not, in any wise, illustrative of the return enjoyed by others engaged in like business, that is to say, other multiple outlet retail grocery organizations doing business in this State.

5. Defendants further allege that the great volume of business enjoyed by plaintiff, and others similarly situated, and the consequent progressive increase in the ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws, as follows:

(a) It is a well established and well recognized law of merchandising economics, in so far as retail business such as conducted by plaintiff, and others similarly situated, that those merchants who enjoy a greater volume of business comparable to the volume enjoyed by plaintiff, and others similarly situated, have a much greater buying power than those enjoying a smaller volume of trade.

They say that this plaintiff, and others similarly situated, can, and do, buy goods, wares, and merchandise at a much greater discount and at a much lower price than the smaller individual merchants having a smaller volume of trade can purchase goods, wares, and merchandise of the same quality. That this plaintiff, by reason of said greater volume of trade and its great number of outlet stores, can and does contract for the entire output of many manufacturers, canners, and packers engaged in the preparation of goods, wares, and merchandise for retail trade.

They say that this plaintiff, and others similarly situated can, and do, buy their goods, wares and merchandise in car load lots and often in multiple car load lots, and they can, and do, purchase merchandise at —% less than goods, [fol. 91] wares, and merchandise of like quality can be bought or purchased by individual retail merchants having a smaller volume of trade and who are competitors of this plaintiff and others similarly situated.

(b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as volume increases.

Defendants say that this is true because plaintiff, and others similarly situated, owning many stores respectively, are enabled to, and do, deliver goods, wares and merchandise daily to practically all of their stores and are thus enabled to do a great volume of business with a minimum investment.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended, and in practical operation and effect does equalize the tax burden heretofore borne by those doing a retail business in this Commonwealth, and that said equalization is brought about in part by reason of the following:

(a) Retail grocery stores now doing business in this Commonwealth, as a class, are forced by the demands of trade to sell the following articles, oleomargarine, soft drinks, and cigarettes, the privilege of selling of each of said commodities entailing the payment of license tax to the State of $10, and that without regard to the amount of volume of sales of either of said commodities; the practical operation and effect of said license tax levied on the privilege of selling the above commodities is to penalize, punish, and to place an undue burden on individual retail merchants having a small volume of business, and to favor and subsidize this plaintiff and others similarly situated.

(b) Defendants further allege that it is the law of this Commonwealth that all property subject to a state ad valorem tax is assessed as of July 1 of each year, and that the value and amount of the property owned and in this State at that time determines the amount of taxes imposed without regard [fol. 92] to the amount or value of property owned and in this State on any other day of the year.

Defendants say that this plaintiff, and others similarly situated, as a class, have heretofore, and do now, practically escape ad valorem taxation in this State by reason of the fact that they are enabled to, and do, by the very nature and operation of their business, have on hand for assessment as of July 1 of each year a minimum amount of merchandise, but that, on the other hand, individual merchants with a small volume of trade, who are endeavoring to compete with

plaintiff, and others similarly situated, or by reason of the fact that they own but one store, and for further reason that they have a lower turnover and are compelled to, in order to meet trade demands, carry a much larger stock subject to ad valorem taxation at all times, including July 1, and that thus such individual merchants are compelled to, and do, bear an undue and unjust proportion of the ad valorem taxation levied on retail merchants of this Commonwealth.

Defendants further say that this plaintiff in particular, and others similarly situated, maintain supply depots and warehouses in the State of Ohio and other adjoining states; that they can, and do, deliver to their respective stores goods, wares, and merchandise only in such amounts as are necessary to meet daily trade demands, and by reason of the fact that the State of Ohio has a different assessment date than the State of Kentucky, they can, and do, so arrange the transfer of goods, wares and merchandise so as to practically escape ad valorem taxation in both states by the simple expedient of having a great bulk of such goods, wares, and merchandise in Ohio, or some other state, on July 1, and in Kentucky on the assessment date of such other states.

(c) Defendants further allege that this plaintiff, and others similarly situated, are enabled to, and do, escape taxation altogether on money in banks of this State, by the [fol. 93] simple expedient of sending their money received from sales to another state as soon as it is received, but that this practice can not be followed by individual competing merchants.

(d) Defendants further allege that this plaintiff, and others similarly situated, who have for many years, and are now enjoying a great volume of business in this Commonwealth, have never paid, and are not now paying, their just and due proportion of the taxes levied in this Commonwealth upon retail merchants, but that said tax burden has been, and is now being borne by the small individual retail merchants in this State out of all proportion of volume of retail business enjoyed by them.

They say that those merchants enjoying the greater volume of business are not now paying more than 0.2% of the annual volume of sales for tax purposes, but that on the other hand, the small retail merchants have been, and are now, paying taxes for tax purposes at the rate of 1.3% of the gross annual sales.

7. Defendants further allege that the individual merchants in this Commonwealth, that is to say, those doing a small volume of business, owning but one store, and that store in or near the community in or where they reside, have for many years rendered to their home communities certain social services.

They say that said merchants, as citizens and residents of their respective communities, are taking and have heretofore taken, a prominent and leading part in all the charitable, religious, cultural, and social activities of their respective communities; they have, both voluntarily and in response to the pressure of public demand, given freely both of their time and money to all community activities. They say that said activities, so carried on by said merchants as a class, were worth, and are now worth, much actual money to this Commonwealth.

Defendants further say that with the coming of the multiple owned stores, such as operated by this plaintiff and [fol. 94] others similarly situated, that such individual merchants are in large part being driven from business, and that the burden heretofore borne by said individual merchants as a class, will of necessity fall upon the State, and that the State can only bear said burden by an increase in taxation.

They state that the clerks, managers, and employees who operate plaintiff's stores, can not, by the very nature of their employment, take any material part in any community activities; that plaintiff's stores are conducted with one objective; and that that objective is to take from each community in which said store is situated the greatest possible amount of money.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for certification "Exhibit A".

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defend-

ants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Carey & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fols. 95 & 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed April 1, 1931

Comes now the plaintiff, The Kroger Grocery & Baking Company, in the above entitled cause, and for its reply to the answer filed on behalf of the defendants, states as follows:

1. Plaintiff denies that the Act in question (House Bill [fol. 97] No. 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a graduated tax upon the sale of goods at retail in the State of Kentucky, and plaintiff further denies that the same rate is levied upon each merchant doing a given amount of annual gross retail buiness without regard to whether such merchant operates one store or many stores.

2. Plaintiff denies that the classification made as a basis for the tax imposed by said Act rests upon volume of gross sales or upon ability of the merchant affected by the various gradations of the Act to pay the tax imposed; plaintiff denies that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, and plaintiff states that the per cent of income per dollar of investment has no relation whatsoever to the volume of sales, and plaintiff alleges that lack of relationship between per cent of income per dollar investment and vol-

ume of sales applies in the grocery business generally and to grocers operating in the Commonwealth of Kentucky as well as to other retail merchants.

3. Plaintiff denies that persons having large volume of sales necessarily have an increased ability to pay, and plaintiff alleges that the tax levied by the Act in question has no relationship to ability to pay and that said tax is levied on gross sales and bears no relation whatsoever to net income. Plaintiff further alleges that gross sales of any particular merchant has no relation to the net income of said merchant.

[fol. 98] 4. Plaintiff denies that the Kroger Grocery & Baking Company have made a profit of more than 3.1% on its annual sales in the Commonwealth of Kentucky, and plaintiff denies that it has realized a net income on capital invested in the retail business in the Commonwealth of Kentucky of 17.4%, and plaintiff denies that after the imposition of the tax imposed by the Act in question it will still have a net return of more than 13% on its invested capital, and plaintiff denies that there has been any mismanagement, internal dissension or unsound purchasing practices followed by it. Plaintiff denies that persons similarly situated will have a net return of more than 13% on their invested capital after the imposition of the tax in question, and plaintiff alleges that its return is illustrative of the return enjoyed by others engaged in a similar business, and plaintiff alleges that the per cent of profit to sales on such similar concerns does not exceed 1.5 to 2%.

5. Plaintiff denies that merchants enjoying a greater volume of business have a greater buying power than those enjoying a smaller volume of trade, and plaintiff states that many merchants with a small volume of trade have, by means of cooperative organizations, a buying power which is equal to or greater than that of the plaintiff. Plaintiff alleges that individual merchants having a volume of trade which is smaller than the retail sales of this plaintiff can purchase goods, wares and merchandise of the same quality at the same discounts as are given plaintiff and at the same [fol. 99] price that plaintiff has to pay for said goods, and plaintiff says that merchants having a smaller volume than this plaintiff, by means of voluntary purchasing combina-

tions, can and do contract for the entire output of many manufacturers, canners and packers engaged in the preparation of goods, wares and merchandise for retail trade.

Plaintiff denies that the ratio of turnover to capital invested increases progressively as volume increases and plaintiff alleges that increased sales, in many instances, are a result of an increased capital investiment and not as a result of an increased rate of turnover. Plaintiff further alleges that individual merchants, conducting a single store, and having a smaller volume of sales, have a turnover which is equal to the turnover enjoyed by this plaintiff and have a minimum investment which bears the same proportion or a smaller proportion to their sales than the ratio of plaintiff's investment to its sales, and plaintiff says that these individual merchants enjoy a per cent of profit on capital invested which is equal to or exceeds the per cent of profit to capital invested enjoyed by this plaintiff.

Plaintiff says that it makes frequent delivery of goods, wares and merchandise to all of its stores in order to enable the public to secure fresh food, meats and vegetables at said stores, and plaintiff says that said frequent deliveries entail the use of expensive distribution agencies, such as trucks, warehouses, etc., and require the employment of a great number of persons. Plaintiff says that because of the use of said expensive equipment and because of the em- [fol. 100] ployment of persons for the purpose of making frequent deliveries to its stores, it is required to expend a great deal of money, and plaintiff denies therefore, that the frequent delivery of goods, wares and merchandise to its stores enables it to do a great volume of business with a minimum investment.

6. Plaintiff denies that the tax burden heretofore borne by those doing a retail business in the Commonwealth of Kentucky was unequal and plaintiff alleges that it has at all times borne its proportionate share and paid to the Commonwealth of Kentucky and to the municipalities and subdivisions thereof all taxes which were levied on all other retail merchants at the same rate as paid by other retail merchants, and that this plaintiff has paid all other taxes at the same rate as has been paid by other individuals in the State of Kentucky. Plaintiff denies that the tax imposed by the Act in question was designed or intended to equalize the tax burden. Plaintiff states that the effect and opera-

tion of the Act in question will be to impose a burden on this plaintiff and others similarly situated and plaintiff further alleges that by reason of the low rate imposed on competitors and the deductions allowed, said competitors will only pay a negligible sum under the Gross Sales Tax Law. Plaintiff says that as a result of the discriminatory rates and deductions allowed a greater percentage of the tax burden will be placed on this plaintiff and others similarly situated, than is placed upon other retail merchants, and that this burden will be imposed without regard to ability to pay.

[fol. 101] Plaintiff admits that it pays a license tax for oleomargarine of $10., and plaintiff states that said license tax of $10. is imposed on each store operated by plaintiff, and plaintiff states that the sales of oleomargarine in each of its stores does not exceed the sales of oleomargarine by competitors who operate only a single store, and plaintiff denies that the practical operation and effect of said license tax levied on the privilege of selling the above commodity is to penalize, punish or place an undue burden on individual retail merchants who operate only a single store, and plaintiff further denies that the practical operation and effect of said license tax favors or subsidizes this plaintiff, or others similarly situated.

Plaintiff admits that it sells soft drinks and cigarettes and plaintiff states that it pays for each of the stores in which it sells soft drinks and cigarettes, a fixed license fee. Plaintiff alleges that the cigarettes and soft drinks sold in each of its stores does not exceed the cigarettes or soft drinks sold by its competitors operating a single store. Plaintiff denies therefore, that the practical operation and effect of said license taxes levied on the privilege of selling the above commodities is either to penalize, punish or place an undue burden on individual merchants operating a single store, or to favor or subsidize this plaintiff.

Plaintiff further alleges that the tax paid for the privilege of selling oleomargarine, soft drinks and cigarettes is in direct proportion to its sales of those particular [fol. 102] items. Plaintiff further says that the percentage of such tax to its sales of the particular items for which the tax is imposed, is as great as the percentage of tax paid for special licenses by individual merchants to the sales of similar articles by said individual merchants.

Plaintiff denies that this plaintiff or others similarly

situated, have heretofore and do now practically escape ad valorem taxes in the State of Kentucky, and plaintiffs deny that on July 1st, of each year they have on hand for assessment a minimum amount of merchandise. Plaintiff says that on July 1st, the plaintiff has on hand merchandise which is equal in value to merchandise on hand any other day during the year, and plaintiffs deny that individual merchants are compelled to and do bear an undue and unjust proportion of the ad valorem taxes levied on retail merchants of the Commonwealth of Kentucky.

Plaintiff denies that persons operating a single store have a lower turnover than this plaintiff, and plaintiff denies therefore, that said individual merchants are compelled to and do bear an unjust and undue proportion of the ad valorem taxes levied on retail merchants in the State of Kentucky.

Plaintiff denies it transfers goods, wares and merchandise from the State of Kentucky so as to escape ad valorem taxation, and plaintiff further denies that goods are moved out of this state or out of any other state for the purpose of evading the assessment of personal property or any other tax. Plaintiff alleges that a stock of goods, wares and merchandise in each store is maintained in relation to [fol. 103] the needs of the store and the demands of customers, and plaintiff states that the needs of each particular store and demands of customers purchasing goods at Kentucky stores are no different on July 1st, than on any other date, and plaintiff states that the goods, wares and merchandise in stores in the State of Kentucky on the first day of July, 1930, are equal to the supply of goods, wares and merchandise at any other time.

Plaintiff denies that it evades taxation on money in banks in the State of Kentucky by sending its money to any other state, and plaintiff states that individual merchants operating only one store have the same rights and same opportunities of depositing their money where they desire, as are enjoyed by this plaintiff.

Plaintiff denies that merchants enjoying a greater volume of business in the Commonwealth of Kentucky have never paid and are not now paying their just and due proportion of the taxes levied in the Commonwealth of Kentucky upon retail merchants, and plaintiff denies that merchants having a greater volume of business are not paying

more than .2% of the annual volume of sales for tax purposes, and plaintiff further denies that small retail merchants are paying as high as 1.3% of the gross annual sales for tax purposes. Plaintiff states that the ad valorem taxes of the State of Kentucky are based on the value of the property and that this plaintiff and others similarly situated pay at the same rate on the value of their property as do individual merchants having a smaller volume of sales.

[fol. 104] Plaintiff denies that individual merchants in the Commonwealth of Kentucky doing a small volume of business and owning but one store render any special service to the community by reason of the fact that they operate a retail store.

Plaintiff further denies that the operation of its business or the operation of similar businesses has caused individual merchants to be driven from business, and plaintiff denies that there has been any special burden carried by said individual merchants, and plaintiff further denies that any special burden falls upon the state by reason of the operation of plaintiff's business.

Plaintiff further denies that the purpose of the Kentucky Gross Sales Tax Law was to prevent individual merchants from being put out of business, but plaintiff says that the purpose of said tax law was to subsidize individual merchants operating a single store at the expense of this plaintiff, although said subsidized merchants conduct a business which is similar to that of plaintiff, and compete directly with this plaintiff.

Plaintiff denies that the clerks, managers and employees who operate plaintiff's stores cannot, by the nature of their employment, take any material part in the community activities, but plaintiff states that these employees do take part in community activities, and plaintiff further alleges that it encourages its employees to take an interest in the life of the community in which they reside. Plaintiff denies that its stores are conducted with the objective of taking from each community in which said store is situated, the [fol. 105] greatest possible amount of money. Plaintiff states that it endeavors to sell food of the highest quality at the lowest possible price and that as a result of the saving which customers enjoy, because of the small margin of

profit, that the communities in which plaintiff's stores are situated have retained a great amount of money which would be lost to said communities if consumers purchased their food products at the establishments conducted by persons who did not attempt to sell merchandise of the quality sold by plaintiff at prices equal to prices charged by this plaintiff.

7. Plaintiff denies that House Bill No. 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled and filed in exact conformity with the Constitution and Laws of the State of Kentucky, and plaintiff states that said Act was introduced, read, passed, enrolled and signed under the title: "H. B. 111, An Act to Restrain the Unfair Competition of Chain Stores and in Aid of Individual Merchants of the Commonwealth."

Wherefore plaintiff prays that the above entitled Act be held unconstitutional and that the defendants be enjoined in the manner prayed for in its Bill of Complaint, and for its costs herein expended, and for all other proper relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 106] *Duly sworn to by C. M. Robertson. Jurat omitted in printing.*

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF SUBMISSION—Filed Feb. 14, 1931

This day this cause coming on for hearing before the Hon. Chas. H. Moorman, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge, on motion of plaintiff for an interlocutory injunction. The plaintiff introduced the deposition of Shirley Haas filed 2/6/31. The plaintiff, by counsel, filed the affidavits of the following persons, viz:

Robert W. Lyons,	C. R. Leininger,
D. T. Petty,	W. H. Howell,
Albert C. Huneke,	A. C. Miller,
Rufus Blume,	W. G. Jenkins,
John E. Donahue,	T. B. Jones,

Louie C. Jones,
M. R. Anderson,
R. W. Owens,
Fred Levy
N. A. Bash,
B. E. Van Antwerp,
M. S. Gesley,
W. T. Morgan,
H. M. Craven,
C. W. Gowin,
J. A. Gude,
L. M. Ross,
Milton Marx,
Ernest Thompson,
John B. Bonham,
Gilbert J. Schneider,
Walter Wenderoth,
O. W. Vaughn,
John Scanlan,
Brack E. Ferrill,
C. J. Henry,
Crawford Lee,
Dan Byck,
G. H. Parker,
B. E. Willis,
B. A. Aistrop,
Dolph Wile,
Daniel M. Cohen,
W. A. Steinden,
Albert B. Berger,
Francis Ballard,
John C. Schwarz,
Chris Schumann,
Arch B. Davis,
Harman Noe,
Robert J. McKim,
C. B. Turley,
John R. Karibo,
E. R. Probasco,
E. C. Purvis,
O. A. Rhodes,
Robert Wright,
P. O. Wolverson,
J. D. Delano,
H. C. Amstutz,
C. H. Parsons,
James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public [fol. 108] Accountant. The Court heard argument of counsel for the plaintiff.

Came the defendants, by counsel, and filed motion to dismiss, and not waiving same, motion to strike out certain parts of the Bill of Complaint, and not waiving same, answer. Came also the defendants, by counsel, and filed the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill # 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated

Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Plaintiffs were granted leave to file replies to defendants' answers.

The Court heard argument of counsel for the defendants, and not being fully advised of the judgment it is proper to render herein, takes time, and this case is submitted with leave to plaintiff to February 28, 1931, within which to file brief, and defendants to March 10, 1931, within which to file their brief.

And it is further ordered and adjudged that the temporary restraining Order heretofore entered herein on the 29th day of January, 1931, be and the same is hereby continued in full force and effect until the determination of said application for an interlocutory injunction.

February 14, 1931.

Chas. H. Moran, Judge. A. M. J. Cochran, Judge.
Chas. I. Dawson, Judge.

Approved Feby. 23d, 1931.
J. W. Cammack, S. H. Brown, Asst. Atty. Gen.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER LISTING PARTIES PROTECTED BY RESTRAINING ORDER—
Filed March 28, 1931

This day came the parties herein and by agreement it is ordered as follows:

I

Counsel for plaintiffs listed of record the following retail merchants represented by them and included within the same class of taxpayers as plaintiffs in the above-styled four suits, or one of them, namely:

J. C. Penny Co.
Kaufman-Straus Co., Inc.;
H. P. Selman & Co.,
Louis Appel Co.,
Montgomery Ward Co.,

Lord's,
Lemon & Son,
Wm. Kendrick's Sons,
S. S. Kress & Co.,
Kroger Groc. & Baking Co.,
Shenley's, Inc.;
Herman Straus & Sons, Inc.;
J. Bacon & Sons,
Rodes-Rapier Co.,
Geiger & Ament,
Melville Shoe Corp.,
Hubbuch Bros. & Wellendorff,
Husch Bros.,
Bensinger Outfitting Co.,
Western Auto Supply,
Byck Bros. & Co.,
Mangel's, Inc.;
[fol. 110] Levy Brothers,
W. T. Grant Co.,
Great A. & P. Tea Co.,
S. S. Kresge Co.,
Durant-Perry Co., Inc.
John C. Lewis Co., Inc.,
The Stewart Dry Goods Co.,
Denhard Company, Inc.,
Central Furniture,
F. W. Grant Silver,
G. R. Kinney Co.,
National Bellas Hess Co.,
Stearns Coal & Lumber Co.,
The Sutcliffe Co.,
Consolidated Auto Supply,
F. W. Woolworth Co.,
S. S. Specialty Shop,
Besten & Langen,
D. H. Ewing's Sons,
W. K. Stewart Co.,
Wilson Bros.,
S. M. Goldberg Operating Co.,
Walgreen Co.,
Hook Drug Co.,
Sears & Roebuck,
Louis K. Liggett Co.

By consent of parties, plaintiffs and defendants, it is now ordered that the protection afforded by the restraining orders issued in these cases shall be restricted to the various retail merchants listed in this order, and shall not extend to any other retail merchants in the State of Kentucky unless such other retail merchant or merchants shall be hereafter included in said list by supplemental order herein made, upon such terms as may be agreed upon by the parties or ordered by the Court.

II

By further agreement of the parties, it is hereby ordered that, in addition to the $5,000.00 bond heretofore given by the plaintiffs in each of the above-styled cases, the plaintiffs in each of said cases shall give a further bond, with good security to be approved by the Court or the District Judge presiding therein, in the penal sum of $10,000.00, conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants, or any of them, who may be found to have been wrongfully enjoined or restrained thereby. Such bond shall be filed within 10 days from this date, and in default of such filing, the statutory Court may make such orders as it may deem proper with reference to the continuance in force of the restraining orders issued in the above cases.

The object of this agreed order is to furnish a bond of $15,000.00 in each of the above-styled cases as a condition [fols. 111 - 115] of said restraining order.

Chas. H. Moorman, A. M. J. Cochran, W. M. Dawson, Judges.

March 28, 1931.

Agreed to.

Robert S. Marx, John C. Doolan, Solicitors for Plaintiffs. S. H. Brown, Solicitor for Defendants.

[fol. 116] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants.

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed Nov. 6, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchant's Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

[fol. 117] "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax and when due, and if paid under protest may at any time within two years from the date of such payments sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon

from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal Courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislature intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the Auditor of Public Accounts is, in reality, an action against the state. The section does not contemplate that the Auditor shall personally satisfy any judg- [fol. 118] ment obtained under its provisions. By its express terms the ultimate liability is that of this State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10

as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in a Federal Court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Federal courts granted to States by the Eleventh Amendment to the Federal Constitution.

The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal [fol. 119] courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the

Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal Court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the Court's jurisdiction which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory [fol. 120] duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have

been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal Courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable maneing of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer [fol. 121] to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky. 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judg-

ments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such [fol. 122] warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed in the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from

a sovereign State unless its recovery is specifically authorized by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probably that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General [fol. 123] Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as ma-y payments as may have been made, and which are not barred by the limitation of two years herein, imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may united in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to

avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal princi-les. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

[fol. 124] Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the cou-ts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We, therefore, conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 125] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

THE KROGER GROCERY & BAKING COMPANY, Complainant,

vs.

JOHN B. LEWIS et al., Defendants

ORDER AND DECREE—Filed Dec. 10, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, Fred Levy et al. against the same defendants, and The J. C. Penney Company against the same defendants, pending in the United States District Court for the Western District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kruger Grocery and Baking Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law afforded to [fol. 126] the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended; to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, However, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of [fols. 127-141] any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer, under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the

bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

Have seen.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. Burke & Lawton, Solicitors for Ben Snyder, Incorporated. J. W. Cammack, S. H. Brown, Leslie W. Morris, Batson, Cary & Welch, Solicitors for Defendants.

[fol. 142] In United States District Court

[Title omitted]

Order Substituting Party Defendant—Filed March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen.

S. H. Brown.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 1, 1932.

The plaintiff, The Kroger Grocery & Baking Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed in the motion of plaintiff for such interlocutory injunction, hereby appeals to the Supreme Court of the United States from said order and decree denying its motion for an interlocutory injunction as prayed therein.

The plaintiff, further conceiving itself aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss this plaintiff's bill of complaint and directs the dismissal of said bill of complaint and denies to this plaintiff a permanent injunction or any injunctive or other relief prayed by it and adjudges that plaintiff's said bill of complaint be dismissed and that the defendants recover of plaintiff their costs in [fol. 144] this cause expended, hereby appeals to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to this plaintiff a permanent injunction, or any injunctive or other relief prayed by it, and decrees that its said bill of complaint be dismissed and that the defendants recover of this plaintiff their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein designated of said order and decree herein appealed from.

Plaintiff prays that its said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts

of the Commonwealth of Kentucky, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

The Kroger Grocery & Baking Company, by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

Copy recd.

S. H. Brown, Asst. Atty. Gen.

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 1, 1932

The plaintiff, by counsel, respectfully represents that in the records and proceedings had in the above-entitled cause and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiff makes the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiff's motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiff's bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill [fol. 146] as unconstitutional and hereinafter, for brevity,

referred to as the challenged Act, affords to the plaintiff a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to plaintiff by any provision of Kentucky law is plain or adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiff.

(3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiff in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the amount of any illegal tax exacted of plaintiff, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its [fol. 147] Auditor of Public Accounts as its representative, that might be brought by plaintiff in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts, as its representative, might be sued at law in any court of the United States in an action by plaintiff for the recovery of illegal taxes exacted of it under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest thereon, might be recovered in any action in any court of the United States, or in any other court except a court of competent

jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky, against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiff under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

[fol. 148] (10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreasonable delay would be encountered by plaintiff in obtaining a refund or a recovery of illegal taxes exacted of plaintiff under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when presented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiff in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of

law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-618, to the effect that it is the duty of the Treasurer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

[fol. 149] (14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiff any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and to the prompt administration thereof, as the remedy in equity herein sought by plaintiff.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiffs.

(16) The Court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiff on taxes illegally exacted of it under the challenged Act.

(17) The Court erred in holding that plaintiff, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to it pursuant to any such judgment, can legally or equitably be required, upon the nonpayment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

[fol. 150] (18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiff under said Act in successive years during the pendency of suits testing the validity of such Act.

(19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiff pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of itself and a numerous class of other retail merchants similarly situated, many of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the constitutionaliality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims herein asserted by plaintiff on its own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law between plaintiff and numerous other retail merchants similarly situated, and the defendants as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in failing to hold that plaintiff's action is a class suit within the meaning of the 38th Equity Rule and is consequently maintainable in a Federal Court of Equity.

(21) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

[fol. 151] II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S.

613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

(2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation pre- [fol. 152] scribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiff's motion for an interlocutory injunction, that the challenged Act, in its

actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiff the equal protection of the law in that, in practical effect, it operates to impose upon plaintiff a grossly excessive and disproportionate burden of the taxes levied under said Act, merely because of the larger volume of plaintiff's gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, [fol. 153] competitors of the plaintiff engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(6) The Court erred in declining to consider and in failing to hold upon the evidence adduced at the hearing, that the challenged Act denies plaintiff the equal protection of the laws and unjustly and unreasonably discriminates against the plaintiff by reason of the fact that plaintiff with sales of $13,000,000 is required to pay a tax which is twice the combined tax which 16,374 retail merchants similarly situated with the plaintiff, would have to pay on $260,000,000 worth of sales.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky, in that said Act, in each of the particulars specified in assignments (1) to (6), both inclusive, under this heading II, captioned "Additional Assignment of Errors Committed by the Court in its Interlocutory Decree Denying Plaintiff's Motion for an Inter-

locutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

(8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that, as to taxes claimed of plaintiff on account of sales made in the period between [fol. 154] March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of this plaintiff under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respects said challenged Act denies to this plaintiff the guaranty and protection of due process of law afforded to it under the Due Process Clause of the Fourteenth Amendment to the Constitution of United States.

(9) The Court erred in declining to consider and in failing to hold that the tax levied by the challenged Act is confiscatory and therefore deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

(10) The Court erred in declining to consider and in failing to hold that the challenged Act is a burden on interstate commerce by reason of the fact that it taxes the sale of products moving in interstate commerce.

(11) The Court erred in declining to consider and in failing to hold that the challenged Act is a burden on interstate commerce and discriminates against products of States other than Kentucky by reason of the fact that it imposes a tax on the sale of farm products grown outside of Kentucky and exempts *slight* products raised in Kentucky.

[fol. 154½] Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiff prays that each of said decrees herein appealed from, namely, the in-

terlocutory decree and the final decree as hereinbefore set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

Copy rec'd.

S. H. Brown, Asst. Atty. Gen.

[fol. 155] In United States District Court, Eastern District of Kentucky

Equity Docket No. 3908

The Kroger Grocery & Baking Company, Plaintiff,

vs.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants.

Order Allowing Appeals—Filed March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

[fols. 156-160] 3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date, as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages, required herein, shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Notice waived.

Batson, Cary & Welch, S. H. Brown, Asst. Atty. Gen.

[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF COUNSEL AS TO WHAT SHALL CONSTITUTE THE RECORD OF APPEAL—Filed March 24, 1932

It is hereby stipulated and agreed that the record on appeal in this cause in the Supreme Court of the United States shall consist of the following:

I. Bill of Complaint.

II. Application for interlocutory injunction.

III. Motion for temporary restraining order.

IV. Motion of defendants for an order in regard to plaintiff's book.

V. Motion of defendants for continuance.

VI. Order convening three judge court filed January 20, 1931.

VII. Temporary restraining order entered January 29, 1931.

VIII. Bond in the sum of Five Thousand ($5,000) Dollars filed January 29, 1931.

IX. Order authorizing plaintiff to sue as representative of a class, entered on January 31, 1931.

[fol. 162] X. Motion for extension of time to answer.

XI. Order extending time to plead.

XII. Order continuing temporary restraining order in force until hearing on application for interlocutory injunction, entered February 7, 1931.

XIII. Motion of the defendant to strike certain allegations from the plaintiff's Bill of Complaint.

XIV. Motion of the defendant to dismiss plaintiff's Bill of Complaint.

XV. Answer of the defendants.

XVI. Reply of the plaintiff.

XVII. Order of submission filed February 14, 1931.

XVIII. Order listing parties protected by restraining orders filed March 28, 1931.

XIX. Order in reference to Ben Snyder, filed April 15, 1931.

XX. Additional bond of the plaintiff in the sum of Ten Thousand ($10,000) Dollars filed on April 2, 1931.

XXI. Letter of James Martin and A. H. Brendel in regard to gross sales tax report analysis and analysis.

XXII. The affidavits of the following persons read in support of the application for an interlocutory injunction:

(1) Arch B. Davis.

(2) Robert W. Lyons.

(3) John B. Bonham and contract of Independent Grocers Alliance attached thereto as exhibit.

(4) W. A. Steiden and exhibits attached thereto.

(5) Gilbert J. Schneider and exhibits attached thereto.

(6) D. T. Petty and exhibits attached thereto.

(7) Albert B. Berger, and exhibits attached thereto.

[fol. 163] (8) John E. Donahue and exhibit attached thereto.
(9) John Scanlan and exhibits attached thereto.
(10) Chris Schumann and exhibits attached thereto.
(11) Louie J. Jones, and exhibits attached thereto.
(12) Brack M. Ferrill and exhibits attached thereto.
(13) Albert C. Huneke.
(14) Walter Wenderoth.
(15) Francis Ballard.
(16) Rufus Blume.
(17) O. W. Vaughn.
(18) John C. Schwarz.
(19) Ernest Thompson.
(20) M. R. Anderson.
(21) C. J. Henry.
(22) Harmon Noe.
(23) R. W. Owens.
(24) Crawford Lee.
(25) G. H. Parker.
(26) Robert J. McKim.
(27) Fred Levy.
(28) Dann Byck.
(29) C. B. Turley.
(30) Milton Marx.
(31) Daniel M. Cohen.
(32) H. C. Amstutz.
(33) L. M. Ross.
(34) Dolph Wile.
(35) C. H. Parsons.
(36) C. R. Leininger.
[fol. 164] (37) E. R. Probasco.
(38) B. E. Van Antwerp.
(39) W. H. Howell.
(40) E. C. Purvis.
(41) M. S. Gesley.
(42) A. C. Miller.
(43) O. A. Rhodes.
(44) W. T. Morgan.
(45) W. C. Jenkins.
(46) Robert Wright.
(47) H. H. Craven.
(48) T. B. Jones.
(49) P. O. Wolverson.

(50) C. W. Gowin.
(51) B. E. Willis.
(52) J. D. Delano.
(53) J. A. Gude.
(54) B. A. Aistrop.
(55) James W. Stites.
(56) Paul H. Nystrom.
(57) James R. Karibo and exhibits referred to therein.
(58) N. A. Bash and exhibits referred to therein.

XXIII. Narrative of the testimony of Shirley E. Haas.

XXIV. The affidavits of the following persons read by respondents in opposition to application for interlocutory injunction:

(1) Henry F. Walradt and exhibits referred to therein.
(2) James W. Martin and exhibits referred to therein.
[fol. 165] (3) Clyde W. Phelps.
(4) B. T. Brewer.

XXV. Narrative of testimony of Walter Burr.

XXVI. Certified copy of record in regard to House Bill No. 111 in the House and certified copy of Journal of Senate in regard to same measure.

XXVII. Opinion of the Court.

XXVIII. Order and decree denying interlocutory injunction and dismissing Bill of Complaint and continuing temporary restraining order in effect pending appeal upon the giving of bon-s entered on December 10, 1931.

XXIX. Bond of the following concerns in accordance with order of December the 10th:

(1) The Kroger Grocery & Baking Company.
(2) The Great Atlantic & Pacific Tea Company.
(3) Walgreen Company Drug Stores.
(4) G. R. Kinney.
(5) Melville Shoe Company.
(6) F. W. Woolworth Company.
(7) S. S. Kresge Company.
(8) Louis K. Liggett Company.
(9) S. H. Kress Co.
(10) National Bellas Hess Company.
(11) Sears Roebuck & Company.

XXX. Order approving bonds entered January the 9th, 1932.

XXXI. Stipulation of parties substituting J. Dan Talbott as party in place of Clell Coleman.

XXXII. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

XXXIII. Petition for appeal filed March 1, 1932.

[fols. 166-168] XXXIV. Assignment of errors filed March 1, 1932.

XXXV. Order allowing appeal filed March 1, 1932.

XXXVI. Appeal bond.

XXXVII. Citation and endorsement of accepted service thereon.

XXXVIII. This stipulation of counsel as to what shall constitute record on appeal.

Robert S. Marx, John C. Doolan, James W. Stites, Harry Kasfir, Frank E. Wood, Solicitors for Appellant. Bailey P. Wooten, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 169] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

Statement of Evidence

EXHIBIT IN EVIDENCE

Brendel 1

February 13, 1931.

Hon. J. W. Cammack, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky; Hon. Frank E. Wood, 900 Traction Building, Cincinnati, Ohio.

GENTLEMEN: As per your request of February 9th, we are attaching hereto a report showing the number of Gross Sales Tax Reports filed with the Gross Sales Tax Department of the Commonwealth of Kentucky, and an analysis of same up to and including February 12, 1931.

These statements were compiled under the supervision of Mr. Joseph Martin, Supervisor of the Gross Sales Tax Department, and Mr. A. H. Brendel of the firm of J. D. Cloud & Co., Certified Public Accounts, and we hereby cer-

tify that the attached statements are true and correct to the best of our knowledge and belief.

Respectfully submitted,

Joseph Martin, Supervisor Gross-sales Tax Department. A. H. Brendel, Certified Public Accountant.

[fol. 170] Number of Blanks Sent Out (Estimated by Mr. Martin), 55,000

Number of Reports Filed by Retail Merchants

	Number filed	Number indicating tax	Number indicating no tax
Showing retail sales less than $400,000	16,353	11,025	5,328
Showing retail sales between $400,000 and $500,000	9	6	3
Showing retail sales between 500,000 and 600,000	4	2	2
Showing retail sales between 600,000 and 700,000	4	3	1
Showing retail sales between 700,000 and 800,000	2	1	1
Showing retail sales between 800,000 and 900,000	1	.....	1
Showing retail sales between 900,000 and $1,000,000	.....	.....	.....
Showing retail sales in excess of $1,000,000	1	.....	1
Totals	16,374	11,037	5,337
Number of reports returned showing retail merchants out of business or not engaged in retail trade (Estimated by Mr. Martin)	1,060		
Total reports received	17,434		

[fol. 171]

Number of Reports Showing Tax Liability

	No. of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing sales less than $400,000	16,353	$247,923,309	$121,741.66	$59,645.00	$62,096.66	$171,795.54
Showing sales between $400,000 and $500,000	9	4,034,504	2,422.40	1,303.71	1,118.69	6,233.71
Showing sales between 500,000 and 600,000	4	2,247,599	1,817.99	1,452.93	365.06	5,283.65
Showing sales between 600,000 and 700,000	4	2,585,035	2,518.57	1,108.12	1,410.45	177.20
Showing sales between 700,000 and 800,000	2	1,485,783	1,642.86	977.52	665.34	1.49
Showing sales between 800,000 and 900,000	1	814,559	636.15	636.15	.....	1,755.24
Showing sales between 900,000 and 1,000,000	.....	.....	.....	.....	.....	.....
Showing sales in excess of $1,000,000	1	1,325,934	6,309.35	6,309.35	.....	4,593.15
Totals	16,374	$260,416,723	$137,088.98	$71,432.78	$65,656.20	$189,839.98

Number of merchants ouside of First and Second Class Cities reporting over $400,000 sales..... Two.

Number of Merchants Reporting Sales of

	Showing tax liability	Showing no tax liability
Less than $10,000	4,897	3,666
$10,000 and under $25,000	3,668	1,108
25,000 and under 50,000	1,521	353
50,000 and under 75,000	455	111
75,000 and under 100,000	187	33
100,000 and under 150,000	152	28
150,000 and under 200,000	61	12
200,000 and under 250,000	34	9
250,000 and under 300,000	22	3
300,000 and under 400,000	28	5
Over $400,000	12	9
Total	11,037	5,337

[fol. 172] AFFIDAVIT OF ARCH B. DAVIS

STATE OF KENTUCKY,
County of Jefferson, ss:

Arch B. Davis, being first duly sworn, states:

I am vice-president of the Citizens-Union National Bank in Louisville, Kentucky. I have held that position for approximately fifteen years.

By virtue of my position I have bought, sold, and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. I believe that I have handled as large a number of Warrants through our bank as any individual in the State.

My experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing and I estimate that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

[fol. 173] Amount of warrants outstanding against the General Fund $9,880,502.76
Amount in General Fund available to pay off same 12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

[Duly verified.]

[fol. 174] AFFIDAVIT OF ROBERT W. LYONS

STATE OF OHIO,
Hamilton County, ss:

Robert W. Lyons, being first duly sworn, makes the following declaration under oath:

I am Executive Vice-President of the National Chain Store Association, which is a trade group comprising a large percentage of the leading retail organizations in this country which own and operate under a common management, more than one store. For the purpose of this affidavit I shall adopt the expressions "chain stores" and "individual merchants" used in the title to House Bill No. 111, Acts of 1930, of the Kentucky General Assembly, as follows: "Chain stores" as meaning more than one store under single ownership and control as contrasted with "individual merchants," meaning a store, the owner of which, owns no other store. Among the functions of the National Chain Store Association is that of collecting and interpreting economic data relating to or influencing the operation of "chain stores." My duties as chief executive of said Association require constant study of the economics of distribution and constant research into the facts and circumstances of the various types of merchandising. My training, in preparation for such work, began in college with the study of economics, finance and law.

In 1915, I was employed as Manager of the Trade Extension and Research Department for the Indianapolis Division of a great rubber manufacturing company. Con-
[fol. 175] tinuing in this field, I became sales representative, special representative, district sales manager, and finally general sales manager. Succeeding this, I became general sales manager of three furniture manufacturing companies operating under unified financial control. Following this, I was actively engaged in the practice of law for a period of five years. For the past two years and one-half, I have been the executive officer of the National Chain Store Association. Acting in this capacity, I testified as an expert witness in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in the case of Lafayette A. Jackson, plaintiff, vs. State Board of Tax Commissioners and the State of Indiana,

William A. Hough, Pliny H. Wolford and Phillip Zoercher, as members of the State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, Attorney General of the State of Indiana, defendants, in connection with the economics of distribution, as well as the functions and operating practices of the "chain stores" and its related or competitive retailing mechanisms. I was duly qualified as an expert witness in the said case and my testimony was so accepted

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United [fol. 176] States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approximately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no co-operation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cities, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the significant facts of retail trade in an area embracing

roughly, 10% of the retail sales of the United States. This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying [fol. 177] these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.

2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.

[fol. 178] 3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.

4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.

5. The relations of employees to consumers must be carefully studied and developed.

6. Good management must be present.

7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread co-operative buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differentiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption avail- [fol. 179] able and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent an additional saving in price and in freight.

Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest

possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small per- [fol. 180] centage of profit on the individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatisfactory merchandise and the fact that such merchandise represents a substantial volume which is necessarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66-2/3% of all the net earnings of stores falling within the above averages.

Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced [fol. 181] to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various nonresident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionately accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

[fol. 182] The best available figures indicate that the average operating expense in retail grocery enterprise is about 18% of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail

price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientific management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-called [fol. 183] "voluntary chains" of independent retailers, comprising more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store". Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his

handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailers in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that [fol. 184] of the regular "chain store," thus saving him substantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating companies have often operated a new store successfully for a year or two years [fol. 185] in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it un-

profitable for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more intimate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual, or so-called "independent merchant". The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" develop- [fol. 186] ment upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. The second period studied was from 1921 to 1929, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent

1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23%

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth [fol. 187] rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent

1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

[fol. 188] Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25% per annum. The year by year mortality figures for this period are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger or more successful organization absorb it rather than to allow it to liquidate in bankruptcy, just as happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

[fol. 189] A. A. Adams Stores.
National Drug Company.
Schulte United.

Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax, representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the State of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

[Duly verified.]

[fol. 190] AFFIDAVIT OF JOHN B. BONHAM

STATE OF OHIO,
Hamilton County, ss:

John B. Bonham, of lawful age, being first duly sworn, deposes and says as follows:

I am 47 years of age and reside with my family at Cleves, near Cincinnati, Ohio. I am at present Vice-President of The Kroger Grocery & Baking Company, in charge of the operations of that Company, which includes purchases, store operations, sales, transportation and advertising. I began

in the grocery business a number of years ago at the bottom and have worked my way gradually through every branch of the grocery business to my present position, which I have held for several years last past. I am thoroughly familiar and conversant with practically every phase of the grocery, meat and vegetable business, and of the methods, practices and economics of wholesale and retail food merchandising and distribution.

The Kroger Grocery & Baking Company is an Ohio corporation and its principal office and place of business is located at Seventh and Walnut Streets in the City of Cincinnati, Ohio. For convenience, I shall use the word "Kroger" in referring to The Kroger Grocery & Baking Company.

Kroger has been in business for approximately forty-seven (47) continuous years. The business was originated by B. H. Kroger, who, until recently, was President of the Company, then Chairman of its Board of Directors, and [fol. 191] is at present a Director. Our records show that B. H. Kroger commenced business in one grocery store, located at No. 66 East Pearl Street, in the City of Cincinnati, Ohio. Kroger still operates that store. He endeavored to sell good food to the public at the lowest possible price and applied all of his ability and industry to making a success of that store. His methods and policies brought him public patronage and good will and his business developed to such an extent that it was necessary for him, in order to serve his patrons to the best advantage, to open additional stores. As a result of good management and the application of progressive and efficient methods and practices of merchandising and the continued policy of selling good food, meat and vegetables at low prices, a large and increasing sales volume was developed and the reputation of Kroger stores spread from Cincinnati across the river to adjoining Kentucky towns and cities, including Covington, Newport, Bellevue, Dayton and vicinity. The number of customers who came to Kroger Cincinnati stores from across the river in Kentucky and to whom free deliveries were then made from Cincinnati stores made it advantageous and convenient for the customers to be served from stores located in Kentucky and more than thirty (30) years ago Kroger opened a retail grocery store in the State of Kentucky and this store was continued along the same

lines which had theretofore met with public favor and patronage. One of the first stores was located at the corner of Fifth and Columbia Streets, Newport, Kentucky, as early as March, 1897. By 1899 there were additional stores at the Northeast corner of Eighth and Monmouth Streets, [fol. 192] Newport, Kentucky, Fifth and Scott Streets, Covington, Kentucky, and at the Northwest corner of Sixth and Berry Streets, Dayton, Kentucky. By 1905 Kroger had eight (8) stores located in Newport, Covington, Bellevue and Dayton, Kentucky, and seven (7) of said stores sold meat. All of these stores are still conducted. Our records show that more than twenty-five (25) years ago Kroger, in connection with said stores, publicly advertised—"It is the combination of highest quality groceries at lowest prices that has built up our immense business." The business of Kroger in Kentucky continued to grow, and in order to serve Kroger customers in the most convenient locations and to the best advantage, Kroger gradually increased the number of stores and localities served in Kentucky over the past quarter of a century until today Kroger has two hundred and sixty-three (263) separate retail grocery stores in various localities throughout the State of Kentucky. Many of these stores were established in response to requests on the part of citizens requesting the establishment of such store in their community.

In the course of the development of the business, separate meat and vegetable departments were added to some of the larger stores and at the present time a number of the stores are known as complete food markets, selling groceries, meats, fruits and vegetables.

The business was not incorporated until April 3, 1902. Prior to that time it was largely owned and managed by B. H. Kroger. The growth of the business and competitive conditions made it necessary from time to time to secure additional capital and in 1902 the business was incorporated. [fol. 193] Thereafter, the general public was given an opportunity to subscribe to the capital of said Company by the purchase of stock therein, and at the present time there are sixteen thousand seven hundred and eighty-five (16,785) separate individual stockholders, located in practically every State of the United State, including a large number who reside in the State of Kentucky. This number necessarily changes from day to day and has been gradually increased.

Kroger business has grown in a similar way across various State lines and Kroger is today engaged in business in the adjoining States of Indiana, Tennessee, West Virginia, Illinois and other States in the middle west.

Kroger, ever since the establishment of its first store in Kentucky, for a period of more than thirty (30) years, has complied with all of the laws of Kentucky and particularly with the laws relating to foreign corporations, and has at all times been properly authorized to do business in Kentucky.

Kroger has made large investments in the State of Kentucky. It has invested large sums in store fixtures and equipment of its stores and in improvements to leaseholds. It has entered into numerous leases for stores, warehouses, etc., in Kentucky, which, in many cases, have a number of years to run. Kroger owns a large warehouse located in the City of Louisville, Kentucky. Kroger also has large sums invested in various personal property in addition to real estate and leaseholds, such as merchandise, transportation equipment, etc.

[fol. 194] Kroger has also invested large sums in intangible items in order to build and develop customer good will and patronage, such as advertising in newspapers and other publications and by way of posters, placards, etc. Kroger expenditures for real estate, rent, for improvements to leaseholds and for work and labor incident to the operation of its Kentucky warehouses and stores have all been made in Kentucky and, other than exceptional cases, have been made to residents of Kentucky. Kroger expenditures for advertising, previously referred to, have been largely expended in Kentucky publications. All of our stores and property in Kentucky are subject to the same taxes, licenses and fees as are imposed generally throughout the State and in the various counties and municipalities where our business is located.

Kroger is paying and has regularly paid, during all of the years it has been conducting a business in Kentucky, all taxes imposed by law, such as the property or ad valorem taxes, occupational taxes, license taxes, and county and municipal taxes. Kroger purchases the light, heat and power used in its business from Kentucky utilities. Generally speaking, except for the purchase of supplies and merchandise which Kroger must purchase,

like everyone else, from the available sources of supply, wherever the same may be located, the money received from the sale of merchandise in Kentucky is expended in Kentucky for taxes, rents, wages, light, heat, power, warehousing, transportation, advertising, etc. Kroger likewise purchases large quantities of supplies in Kentucky, as hereafter set forth. Kroger also pays $16,488.50 for special license taxes. This is the aggregate amount of the [fol. 195] amount paid by the several stores and averages $62.32 per store.

As examples of the above, during the past year, Kroger expended in Kentucky for rent about Three Hundred Forty-two Thousand ($342,000) Dollars; for salaries to employees, One Million Four Hundred Fifty-four Thousand ($1,454,000) Dollars; for the purchase of produce and other merchandise, Two Million Three Hundred Thirty-eight Thousand ($2,338,000) Dollars; and for transportation and truck operations, Three Hundred Fourteen Thousand ($314,000) Dollars. These sums are in addition to the expenditures for taxes, equipment, advertising and permanent investments in real estate, warehouses, etc.

For convenience in the management of its business, Kroger has divided the territory served by it in Kentucky into four divisions. Each of these four divisions is served from a separate branch, namely the Louisville, Kentucky, the Cincinnati, Ohio, Charleston, W. Va., and Herrin, Illinois, branches. The Louisville branch serves from the warehouse located in that city, stores located in the following territory: Louisville, Lexington, Paris, Winchester, Georgetown, Frankfort, Shelbyville, Somerset, Danville, Pineville, Owensboro, Henderson, Hodgenville, Elizabethtown, Bowling Green, Bardstown, Mt. Sterling, Lancaster, Versailles, Carrollton, Midway, Nicholasville, Wilmore, La Grange, Campbellsville, Harlan, Mt. Vernon, Stanford, Lebanon, Springfield, London, Middleboro, Corbin, Madisonville, Hopkinsville, Eminence, Lawrenceburg, Owingsburg, Irvine, Harrodsburg and Owenton. Kroger has only one store in each of the twenty-nine last named munici- [fol. 196] palities. The Louisville branch also serves stores located in Evansville, East Auburn, Jeffersonville, and other towns in the State of Indiana. The manager of the Louisville branch is W. A. Steiden.

The Cincinnati branch serves from a warehouse located in Cincinnati, Ohio, Kroger stores located in Covington, Newport, Dayton, Bellevue, Cynthiana, Ludlow, Ft. Thomas, Maysville, Clifton, Southgate, Alexandria, Silver Grove, Erlanger, Bromley, Florence, Ft. Mitchell, Elsmere, Augusta, Williamstown, Carlyle, Walton, Flemingsburg and Falmouth. In the fifteen last named municipalities, Kroger has only one store in each municipality. The Cincinnati branch also serves from the same warehouse, Kroger stores located in Cincinnati and adjoining territory in the State of Ohio. The Supervisor of the stores in Kentucky which are served from the Cincinnati branch is Albert B. Berger.

The Charleston, West Virginia, branch serves stores located in the following Kentucky municipalities: Pikesville, Prestonburg, Paintsville, Louisa, Russell, Greenup, Olive Hill, Grayson and Ashland. In all of the above municipalities, except Ashland, Kroger has only one store in each municipality. In Ashland, Kroger has five stores. The Manager of the Charleston, W. Va., branch is S. S. Rich. The Charleston, W. Va., branch also serves Kroger stores located in Charleston and surrounding territory in the State of West Virginia.

The Herrin, Illinois, branch serves the Kroger stores located in the following Kentucky municipalities: Paducah, Mayfield and Murray. Kroger has only one store in [fol. 197] Mayfield and one store in Murray. The same branch also serves Kroger stores located in Herrin and surrounding territory in the State of Illinois.

Each of the 263 Kroger stores is operated as a separate grocery store. Each store is managed by a local store manager who has charge of his own employees in his store. Separate accounts are kept for each store. The above list of stores indicates the wide separation in the localities in which our stores are located. The sales of one store are not affected by the sales of a store in a different location. It is not economical or practicable to move unsalable merchandise from one store to another because the cost of doing so is prohibitive. The amount of such merchandise in practice is so small that it does not warrant sending a truck to get it, to say nothing of the fact that when merchandise is delivered to a store the original packages are destroyed and the physical act of re-assembling same for

transfer to another place is impracticable. In addition, the bookkeeping and accounting problems at the central location involved in such a transaction make this practice uneconomical and unworkable. A large number of our stores sell meats, poultry, dairy products, fruit and vegetables in addition to groceries. Other stores carry a more restricted and limited line of merchandise. Many of these stores do not handle meats and poultry. The meat and poultry department is an entirely separate department or division of Kroger business. The employees in charge of this department are independent of the employees in the Grocery Department.

[fol. 198] Kroger grocery stores are in direct competition with other grocery stores in each locality where Kroger conducts a store. The Kroger meat departments are in direct competition with meat stores in said localities, which are limited to the sale of meats or which are departments of other grocery stores. Kroger and all other grocery and meat stores handle the same or similar merchandise, and competition between said stores is based upon quality, price, service, efficiency, sanitary conditions and attractiveness in store arrangement and display of merchandise.

The grocery and food field is a highly competitive one. Thousands of merchants are competing in this field. Kroger has at all times, and is at present, required to meet competition from individual merchants who own but one store, and also from individual merchants who own one store, but cooperate with wholesale grocers or with other individual merchants in large co-operative associations, and also from grocery stores the owner of which owns two or more stores. In many cases, the keenest and best competition in the matter of quality, price, service and general attractive and sanitary display of merchandise comes from individual merchants who own but one store. In a number of cases, the wide-awake individual merchant has been able to attract such a large proportion of the trade of his particular locality, that our Company has been unable to maintain a store in said locality in competition with such merchants, and said store has been closed. In Kentucky, as well as elsewhere, we have had to face keen competition from individual merchants who own one store, but who co-operate [fol. 199] with hundreds of other store owners in co-operative associations. These co-operative associations fall into

three general classes. Some of them are sponsored and served by wholesale groceries, a second class are associations of retailers who own a wholesale distributing house, and a third group is a co-operative buying and merchandising association. All of these co-operative organizations combine a large number of retail grocery stores individually owned, but voluntarily co-operating for the purpose of obtaining the advantages of group or mass buying in carload lots, group or mass distribution of merchandise through co-operative facilities, and group or mass advertising of merchandise. The largest of these associations which operate extensively in Kentucky is the Independent Grocers Alliance, commonly known as the I. G. A. The I. G. A. has approximately 10,000 stores in the United States, chiefly in the middle west. It has about double the number of stores operated by Kroger. I am informed and believe that all of said I. G. A. stores are parties to a contract, of which a copy is hereto attached, and marked Exhibit A. Each of said I. G. A. stores is painted in the same distinctive style; each is arranged and decorated according to a general and uniform plan; each of said stores advertises I. G. A. merchandise in a group with other stores. Each of said stores offers for sale a list of goods known as "highly competitive items," which are sold to member stores by the wholesaler at wholesaler's cost, plus not to exceed 3%. In addition to I. G. A., Kroger stores compete in Kentucky with the following co-operative organizations: Associated Community Stores, Ohio Valley Grocery Company, James Grocery [fol. 200] Company, Merchants' Wholesale Grocery Co., and National Grocery Company. Membership in said co-operative organizations or so-called "voluntary chains" is open, upon the payment of a small fee, to all individual merchants who are thus in a position to avail themselves at their option, of whatever advantages there may be in group or mass buying, merchandising, advertising, and scientific store arrangement, window display, etc. We also have competition from merchants who own two or more stores. The result of the intense competition in the grocery and food field has been to lower food prices to the consumer throughout the United States, including the State of Kentucky, and to bring about more sanitary conditions, and a more attractive display of merchandise in grocery stores.

Kroger has always built its business upon the policy of selling good food and merchandise to the consumer at the lowest possible prices. In order to accomplish this, it has been necessary to sell a large volume of merchandise at a small margin of profit on individual items. The profit which plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price has averaged from 2 to 2½% of its gross sales. However, competition, particularly in the matter of competitive prices, has been so keen during the past few years that although the gross sales of Kroger have steadily increased, the percentage of profit which said Company has been able to earn has steadily decreased. From 1926 to 1929, the sales increased from One Hundred Forty-six Million Nine Thousand Three Hundred Seventy-three ($146,009,373) Dollars to Two Hundred Eighty-four Million, Nine Hundred Fifty-three Thousand [fol. 201] Four Hundred Forty-eight ($284,953,448) Dollars and the reported percentage of profit for all sales decreased from .0288 in 1926, to .0223 in 1929. The combined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows.

	Sales	Average net profit
1926	$146,009,373	.0288
1927	161,299,604	.0271
1928	207,373,551	.0257
1929	284,953,448	.0223

The figures for 1930 are not yet available, but will be supplied as soon as the same have been compiled. My estimate of sales for 1930 is $267,086,028 and the percentage of profit on said sales will be under 2%.

Our Kentucky sales for 1929 were approximately $12,635,115. Owing to economic and competitive conditions prevailing in Kentucky, we sustained a loss on Kentucky business during the years 1929 and 1930. Our sales in Kentucky for the year 1930 were approximately $14,653,448.22, of which approximately $11,639.18 of sales were made between March 17, 1930, and December 31, 1930.

My experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, rents,

taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity [fol. 202] prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, we have a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of mere sales volume to net earnings or profits, is further illustrated by the fact that a number of stores with which we are in competition and which have a smaller sales volume than our stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build his business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive [fol. 203] stores which cater more particularly to the average consumer, who does not require special service or luxury items. I have observed that the same thing is true of other businesses with which I have had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

I have read the Kentucky Gross Sales Tax Law, and know that the law purports to tax the first $400,000 of gross sales at one-twentieth of one per cent, the next $100,000 at two-twentieths of one per cent, and then jumps three-twentieths

of a per cent for each additional $100,000 of gross sales until $1,000,000 is reached, after which the tax is one per cent. I know of nothing in the grocery, meat, poultry or vegetable business which would tend to make $400,000 a dividing line upon which to base anything with relation thereto. The tax jump based on each $100,000 increase in sales is not based upon any means or methods of classification or accounting known to the grocery business. Our average sales per store in Kentucky are about $50,000. An increase of $100,000 in our sales is approximately the sales of two stores, which would make the tax rate jump three-twentieths of a per cent for every two stores which we operate after the first ten, until we reach the twentieth store, when the tax becomes twenty times greater for our twenty-first store than for our first store.

In the operation of our business we make purchases in many different states of the United States in varying quan- [fol. 204] tities, large and small, in order to supply our trade in Kentucky. This merchandise includes all varieties of food products, meats, fruits, vegetables, dairy and creamery supplies and garden and farm products of all kinds. Some of this merchandise is shipped from the states where the same is grown, produced or processed outside of Kentucky to our stores located in the State of Kentucky, where the same is sold at retail. Many of these items are sold in the original packages and containers in which the same are packed or contained for shipment. Many of the items sold in our stores in Kentucky, which are near the borders of the various states bordering Kentucky, are sold to non-residents of Kentucky, living across such state lines. Such goods are transported, carried or delivered to the purchasers thereof from said Kroger stores in Kentucky. For example, one of our stores is located at Middlesboro, Kentucky, which is near the juncture of the Tennessee, Virginia and Kentucky lines and many sales are made from this store to non-residents of Kentucky, living in Tennessee or Virginia. While we purchase in Kentucky for sale in Kentucky stores all available items, including more than three-fourths of our produce, more than sixty (60%) per cent of our meats and a large amount of other items, climatic and manufacturing conditions are such that we are required to purchase a large volume of grocery supplies in other states. For these reasons, we are extensively engaged in

interstate trade and commerce, and ship and transport between Kentucky and other states and sell to customers, both residents and non-residents of Kentucky, groceries, [fol. 205] meats, dairy supplies, and garden and farm products. We sell in our Kentucky stores at retail a large volume of garden and farm products, most of which are produced and grown by Kentucky farmers, and also a large volume which is grown and produced on farms in other states of the United States by farmers residing in such other states.

Kroger also operates, manages and farms a large farm, consisting of 370 acres, located in the State of Ohio, near Cleves. This farm is named "Country Club Farm" after the "Country Club" brand, which is one of our best known and advertised brands. Kroger raises and produces on this farm, cattle, sheep, hogs, poultry, milk and other garden and farm products. Some of the products from the Kroger farm are sold at retail in Kroger stores located across the river in Kentucky, at Covington, Newport and vicinity.

Kroger owns a packing plant, located in the City of Cincinnati, Ohio. Cattle, sheep and hogs raised on the Kroger farm are slaughtered and processed in this packing plant and the meat therefrom is transported to Kroger stores for sale at retail, including Kroger stores located in the State of Kentucky.

Kroger also owns a dairy plant, located in the City of Cincinnati, Ohio. Milk from the Kroger farm is sent to this plant, where the same is processed and transported to Kroger stores for sale at retail, including Kroger stores in Kentucky. I am informed and believe that other large dairies own farms in Ohio and Indiana and transport milk and dairy supplies to Kentucky for sale there at retail.

[fol. 206] Kroger has consistently maintained a policy of having its stores bright, attractive in appearance and maintained in strict conformity with all of the sanitary and health regulations with respect to the sale of food, produce and milk. The sale of good foods under sanitary conditions, prepared, processed and kept in conformity with approved health regulations is beneficial to the public welfare and public health. There is nothing about the maintenance or operation of any Kroger store which is injurious to public health, public welfare, public morals or public safety.

The basis upon which Kroger has built its business by

selling at low prices and relying upon a large volume of sales for a profitable return upon the value of its business is of great benefit to the consuming public. It has enabled the public to obtain food at the lowest possible prices. It contributes to eliminate waste in distribution and Kroger in many instances distributes food in direct line from the producer to the consumer. This results in the most efficient and economical distribution of foods, meats, dairy and farm products, which economical and efficient distribution of food supplies is of great public benefit. Public patronage has given Kroger a large volume of sales and this enables Kroger to dispose of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume. This rapid turnover assures the sale of fresh goods to the consuming public. In the food business this is particularly important and this method of conducting business has been of great value to the consuming public, because it prevents stale stock, stock wastage and stock spoilage.

[fol. 207] I have calculated the tax which Kroger would be required to pay under the gross sales tax previously referred to. This tax will average approximately Four Hundred and Thirty ($430) Dollars per store. If we only operated one store in Kentucky and this store had average sales of about Fifty Thousand ($50,000) Dollars, we would pay no tax because of the low rate of taxation and the credit granted for the payment of license fees. It is only because we own a number of stores and the requirement that each store should pay a tax return based not on the sales of that store but on the sales of all other stores aggregated that our tax amounts to $430 per store. In practical effect the law operates to prevent Kroger from operating a number of stores, solely because of their number. I say this because as a practical grocery man I know that it is impossible to successfully operate an average grocery store, if said store is required to pay a tax of $430 per store and all license fees and other taxes in addition thereto in competition with individual merchants and members of co-operative organizations, who do not pay any tax or only pay one-twentieth of the tax we are required to pay. A one (1%) per cent tax on gross sales will increase the operating expense of a Kroger store and of any well managed grocery store approximately five and one-half (5½%) per cent and no grocery

store can stand this increase in operating expense unless all competitors are subject to a substantially similar increase. It is impossible to shift this burden to the consumer by increasing the retail sale price of groceries, meats, milk, creamery and dairy supplies and garden and farm products for a number of reasons. Competitors who [fol. 208] are not subject to a like tax would be able to undersell us and the resulting loss of trade would make it impossible to operate successfully. Many standard brands are nationally advertised at definite prices and consumer demand for these items at these prices prevents any retailer from selling these nationally advertised brands at higher prices. Prices for numerous other items are fixed in world and national markets and cannot be arbitrarily regulated or controlled within state lines. In Kentucky there is considerable competition across state lines and higher prices cannot be obtained in Kentucky than competitive prices across the state line. For these reasons the tax cannot be shifted but would have to be absorbed by Kroger out of capital or earnings. At the present time, when a condition of economic depression exists, it would have to be paid largely out of capital, or we would be required to close or dispose of a sufficient number of stores to bring our tax within the minimum bracket. We are obligated to pay hundreds of thousands of dollars as rent under leases of stores having years to run and the enforcement of the gross sales tax against our company would inevitably result in an irreparable loss of hundreds of thousands of dollars arising from the inability of our company to continue its business in Kentucky except in a limited number of stores with sales aggregating not to exceed Four Hundred Thousand ($400,000) Dollars.

John B. Bonham.

[Duly verified.]

[fol. 209]

EXHIBIT "A"

I. G. A. Contract

THIS AGREEMENT entered into by the Wholesaler and Retailer, both of whose signatures are affixed hereto

WITNESSETH, THAT

WHEREAS, there exists a great need for closer co-operation between Wholesalers and Independent Retailers throughout the United States in order that both Wholesaler and Retailer may, through close co-operation, secure the many benefits of mass buying, mass merchandising and mass advertising, and in order that many needed economies in the operation of both the Wholesalers and Retailers business may be brought about so that Consumers trading with such Retailers may also in turn receive benefits, thus furthering community prosperity and growth and perpetuating the individually owned retail business, and

WHEREAS, the undersigned Wholesaler has secured a charter from the INDEPENDENT GROCERS' ALLIANCE OF AMERICA (I. G. A.) organized to make co-operation between the Wholesaler and Retailer possible and practicable, and providing a National Headquarters through which plans can be organized and carried into effect for the mutual benefit of the Wholesaler, Retailer and Consumer, and

WHEREAS, the undersigned Wholesaler and Retailer are both desirous of co-operating each with the other for the mutual benefits of both,

NOW, THEREFORE,

THE WHOLESALER WILL

First—Furnish the Retailer with the following advertising matter or other printed material as Headquarters of the I. G. A. from time to time may determine:

(A) 3 window posters per week.
(B) 250 copies of "STORE NEWS" every other week. Six times per year a special, larger edition of "STORE NEWS" to replace the regular issue.
(C) One large window placard each week.
(D) One window display bulletin with cut of display instructions for installation weekly.
(E) One merchandising bulletin monthly (inserted in GROCERGRAM).
(F) One copy of "I. G. A." GROCERGRAM monthly.
(G) Special advertising for use in clearance sale—
3 large window streamers
3 14 x 21 posters
3 10½ x 14 posters
(H) Special merchandising broadsides and bulletins for sales campaigns, etc.

It is understood that the Wholesaler is to have the privilege from time to time of making changes in the above advertising matter as the progress of the movement may make desirable in their judgment.

Second—Furnish a list of goods to be known as "Highly Competitive Items" which will be sold to Retailer by Wholesaler at Wholesaler's cost plus not to exceed 3% without regard to cash discount Wholesaler receives. Provided, however, that the total purchases of such items shall not exceed 25% of Retailer's total purchases from Wholesaler; exclusive of Fruits, Vegetables and Produce.

Third—Wholesaler to co-operate with Retailer on special remodeling and clearance sales.

Fourth—Wholesaler will provide a special supervisor at Wholesaler's Headquarters to co-operate with Retailer.

Fifth—Wholesaler to provide newspaper advertising for "I. G. A." members, newspaper advertising to start when 100 Retailers have signed agreements.

Sixth—Wholesaler will provide "I. G. A." Window Insignias for Retailer's use at cost of $1.25 for two.

Seventh—Procure for Retailer an official membership certificate in the INDEPENDENT GROCERS' ALLIANCE OF AMERICA.

THE RETAILER PROMISES AND AGREES

(A) To use in good faith to the best of his ability the service, insignias, emblems, etc., and expressly agree not to use or permit to be used in or about his store other emblems, insignias or advertising furnished from any other source unless agreed to by Wholesaler.
(B) 1. Paint store front of his store in I. G. A. colors.
2. Erect a sign with Retailer's name and "I. G. A." insignias thereon and affix "I. G. A." emblem transfers to windows.
3. Re-arrange and redecorate the interior of his store using I. G. A. Colors.
All as per "I. G. A." general and uniform plans relating to colors and store arrangements submitted by the Wholesaler to the Retailer. Retailer agrees to do all of this at his own expense.
(C) To pay Wholesaler THREE DOLLLARS AND FIFTY CENTS ($3.50) weekly, in advance, during the life of this agreement for the privilege of participating in the benefits provided for under this agreement.
(D) To pay all invoices on a weekly basis. These settlements to be made by Wednesday covering all purchases for previous week. Payments to be made on net basis on Fruits, Vegetables and Produce and on the agreed list of highly competitive Grocery items and less 2% Discount on the other Grocery items that are bought by the Wholesaler on a discount basis.
(E) To purchase goods from the Wholesaler to the total amount of not less than Five Hundred Dollars ($500.00) per month on Grocery items and Three Hundred and Fifty Dollars ($350.00) per month on Fruits, Vegetables and Produce during the life of this agreement.
(F) To keep his store in a clean and orderly condition and to repaint store and redecorate inside of store from time to time as the need becomes apparent. The outside to be painted at least once each year.

The term of this agreement is for a period of three years from date signed and it is expressly understood and agreed that should at any time the Wholesaler's charter from National I. G. A. Headquarters be terminated this agreement will be automatically cancelled without any liability to either party.

The Retailer hereinabove mentioned shall have the right of three year renewal periods from time to time at the expiration of the preceding three year period providing he lives up to this agreement and co-operates fully with the Wholesaler and carries out the promises and agreements hereinabove recited. The failure of either party to notify the other in writing within thirty days (30) prior to date of expiration of his desire to cancel will constitute a renewal for a three year period.

Retailer further agrees that in the event of the cancellation of this agreement by lapse of time or for other reasons that he will immediately repaint the front of his store so as to eliminate the "I. G. A." colors in order that the store will not mislead the public into believing it is an "I. G. A." store.

In the event that the Retailer either transfers his business or becomes bankrupt or fails to perform his part of this agreement, then and in that case, this agreement shall be deemed cancelled without any liability whatsoever by the Wholesaler to the Retailer and the Retailer agrees to return to the Wholesaler all insignias, signs, emblems, names and membership certificates, etc., and failing to do so, the Wholesaler shall have the right to enter and take possession for itself and its own use as it deems fit all "I. G. A." signs, names, insignias, membership certificates, etc., and shall have the right to withdraw and cease furnishing directly or indirectly all advertising material and service provided for under this contract, and in the event that the Retailer has defaulted in paying the weekly charge hereinabove specified to be paid during the life of this agreement, that said unpaid indebtedness to the date of cancellation shall become immediately due and payable.

The Retailer agrees further that inasmuch as the advertising material has to be ordered thirty days in advance, the Retailer agrees to pay the weekly charge hereinabove mentioned for four weeks after notice of cancellation.

This Agreement entered into at _____ this _____ day of _____ A. D. 19____, between the Wholesaler and Retailer both of whose signatures are affixed to this agreement.

_____
(Wholesaler)

_____ By _____
(Retailer)

[fol. 210] AFFIDAVIT OF W. A. STEIDEN

Louisville, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Jefferson, ss:

Mr. W. A. Steiden being first duly sworn says as follows:

I am 43 years of age and live with my family at Louisville, Kentucky. Ever since I have been in business I have been engaged in the grocery business. I was with Piggly Wiggly Valley Company beginning with 1917 in the capacity of General Manager and for the past two years and at present I have been in the employ of the Kroger Grocery and Baking Company and have been acting as Branch Manager for the Louisville Branch. As Branch Manager my duties consist of the general management, supervision, and control of 222 stores, the greater part of which are in the state of Kentucky. Our branch is divided into 14 districts. Districts 1 to 5 comprise the city of Louisville and they are under my direct supervision. District 6 is out of Jefferson, Hardin, Larue, Warren, and Nelson Counties. I visit the stores in these districts periodically. I check the sales made at each store. I keep the company advised of the progress and special needs of our stores. I also keep in close touch with the competitive conditions in regard to each of our stores and it is a part of my duties to inform the company in case I think it advisable to expand or to take new locations. It is a part of my duties to know something about competing stores. I have listed the Kroger stores in columns 1 and 2 on ex-
[fol. 211] hibit A. In column 3 I have listed a competing store which is operated either by an individual or a corporation who does not own any other store. In column 5, I have listed the affiliation of such store as well as I know the affiliation.

Because I am experienced in the retail grocery business and because of my familiarity with the location of the stores listed on exhibit A as competitors of the Kroger stores, I have estimated the annual sales of these competitive stores and have listed them in column 6 on exhibit A.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery

store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

Grimms' Grocery located at 1482 South Seventh Street has gross sales which I estimate at $75,000.00. The Kroger store in the neighborhood is located at 1504 South Seventh. Its sales are around $35,000.00. I estimate that Ruffra Brothers at 1400 Hepburn Avenue does at least twice as much business as the Kroger store at 988 Barret which is only one block away. R. G. Eggen located at 1501 Winter Avenue is in the immediate vicinity and I estimate its sales as being larger than the sales of a competing Kroger store.

This situation is true in numerous cases in the districts over which I have supervision. In every case the Kroger Grocery and Baking Company and the stores operated by the competitors are similar. They sell the same general class of merchandise.

[fol. 212] The grocery business in the city of Louisville and in the state of Kentucky is hghly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. Almost all the groceries in my district sell soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations who operate a single store. The Kroger store, situated at 2549 W. Market Street, handles soft drinks, cigarettes, and oleomargarine. It pays a $6.00 license fee for the right to sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th and Griffith Avenue, is in direct competition with this

Kroger store. I estimate its annual sales at $50,000 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's Grocery store sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars' worth of sales in Kentucky, the tax on each store would be about $450.00, and when the deduction is taken off there would still remain a tax of about $425.00. [fol. 213] The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

I have listed on exhibit D, the Kroger stores in districts 1 to 7, together with special license taxes which each store has to pay. These taxes are the same for competitors who handle the same products. Almost all the stores operated by competitors, who do not operate any other stores, are in the lower brackets, and because of the credits allowed them, will have no taxes to pay.

The profits which we endeavor to make from store operation in the Branch over which I supervise, do not average over 1½ to 2% on gross sales, but we are not able to make this profit at all times and a number of stores in my district have been operated at a loss for the last two years. The tax, therefore, would take about one half our profit and would frequently turn our profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax has wiped out any margin of profit which we might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or else they could

undersell us without paying any tax on the business which they take away from us. Many of the stores which we operate are under long term leases, and the closing of these stores would involve heavy losses.

[fol. 214] Many of the competitive stores, although individually owned, are now members of a cooperative association. In my district the following cooperative associations are operating, to wit:

Ohio Valley Grocery Company.

James Grocery Company.

Merchants Wholesale Grocery Company.

National Grocery Company.

I have listed on exhibit A column 5, the groceries that I think belong to cooperative associations. There are many on the list that I have marked as independents when they are really associated with some cooperative society. I believe that the Ohio Valley Grocery Company does about a million dollars worth of business a year. If each member of the Ohio Valley Grocery Company would be required to pay the same tax as Kroger does, its tax would be much higher than it is under the Kentucky Gross Sales Tax as passed. However, the state does not aggregate the sales of the cooperative association and as a result the members pay nothing. On the other hand the sales in all the Kroger stores are aggregated and each store has to pay the amount levied in the highest bracket. The members of the cooperative association enjoy all the advantages enjoyed by the Kroger stores. There is group buying and mass merchandising. This situation is the same in the case of the other cooperatives.

In the Kroger organization each store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes which are assessed and the rent which must be paid. Each store is charged for goods purchased by that store and credited with sales made.

W. A. Steiden.

Sworn to before me this 13th day of January 1931. Ernest J. Wiley, Notary Public of Jeff. County, Kentucky. My commission expires June 15, 1933. (Seal of Ernest J. Wiley, Notary Public, Jefferson Co., Ky. My commission expires June 15, 1933.)

[fol. 215]

EXHIBIT "A"

Kroger Stores, District #1

Principal Independent Competitors

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
689	1280 Bards'tn Rd.	Major Taylor	1304 Bardstown Rd.	Ind.	$250,000
1038	St. Matthews, Ky.	Bauer Bros.	St. Matthews	Ind.	78,000
		Robbie & Clemens	" "	Ind.	75,000
		Fisher Bros.	" "	Ind.	16,000
1638	603 E. Walnut	Jas. Hess. Groc.	Clay & Chestnut	Ind.	13,000
		Country Store	Clay & Walnut	Ind.	10,000
		Berlins Grocery	623 E. Walnut	Ind.	8,000
		Ackermans Grocery	Hancock & Fehr	Ind.	26,000
		Wm. E. Mueller	Clay & Walnut	Ind.	10,000
1669	1609 Eastern Pky.	Crawford Groc.	Newburg Road	Ind.	13,000
1871	3300 Frankfort Ave.	Aug Niehaus	Shelbyville Rd.	Ind.	21,000
		C. E. Fry	Cannons Lane Frankft. Ave.	Ind.	50,000
2116	2337 Frankfort Ave.	H. Sohns	2218 Payne St.	Ind.	16,000
		Geo. Oeswien	2216 Frankfort Ave.	Ind.	30,000
		Ed. Eppinger	2257 Frankfort Ave.	Ind.	21,000
		Eiths Market	2269 Frankfort Ave.	Ind.	75,000
2533	2728 Frankfort Ave.	Hudson Market	2720 Frankfort Ave.	Ohio Valley	125,000
		F. C. Schuepbach	2708 Frankfort Ave.	Ind.	26,000
2896	2532 Frankfort Ave.	F. C. Schuepbach	2708 Frankfort Ave.	Merchant Gro. Co.	26,000
3067	1758 Frankfort Ave.	Greens Grocery	1813 Frankfort Ave.	Ind.	10,000
		V. Schmidt	Frankfort & Williams	Ind.	26,000
3157	975 Baxter Ave.	Otte Bros.	630 Baxter Ave.	Ind.	21,000
		Urma Cash Store	Rubel & Breckeridge	Ind.	13,000
		Schoffenberg Bros.	916 Baxter Ave.	Ind.	57,000
		Herbergers Market	1085 Bardstown Rd.	Ind.	36,000
3165	1381 Bardstown Rd.	Ralston Grocery	Bardstown Rd. & Edenside	Ohio Valley	250,000
		Cherokee Grocery	1379 Bardstown Rd.	Ohio Valley	150,000
3215	744 E. Broadway	R. O. Broder	Clay & Gray	Ind.	42,000
		Louis Haefflich	Clay & Gray	Ind.	16,000

		F. A. Curren	800 So. Shelby	Ind	13,000
		Wm. Kelkoff	Shelby & Roselane	Ind	36,000
		H. Dueselkamp	Shelby & Gray	Ind	13,000
		Rogues Market	715 E. Broadway	Ind	36,000
3489	1200 Bardstown Rd	Eggen Grocery	Winter & Edward	Ind	100,000
4399	1882 Frankfort	B. J. Blake	2004 Frankfort Ave	Ind	21,000
		East End Market	2025 " "	Ind	36,000
		P. Knoff & Sons	Frankfort & Vernon	Ind	75,000
4648	1603 Bardstown Rd	Deer Park Grocery	Deer Park & Bardstown Rd	Ind	50,000
[fol. 216]					
5009	St. Mathews, Ky	Bauer Bros	St. Matthews, Ky	Ind	78,000
		Robbie & Clemens	" " "	Ind	75,000
		Fisher Bros	" " "	Ind	16,000
5137	2912 Frankfort	Herman Potts	Stiltz Lane	Ind	31,000

[fol. 217]

Kroger Stores District #2

691	1038 So. 32nd St	Walter Grant	3036 Grant Ave	Do Not Know	$13,000.00
698	306 Woodlawn	Ice & Violett	546 Woodlawn	Ind	50,000.00
		Fallon Mkt	216 Woodlawn	Ind	31,000.00
786	2757 Dumesnil St	J. Irvin	2222 Dumesnil	Ind	13,000.00
1777	2127 W. Kentucky St	Geo. Evers	20th & Maple Sts	Ind	39,000.00
		Andersons Market	23rd & Maple	Ind	26,000.00
		Leo Messmer	23rd & Ky. Sts	Ind	31,000.00
		J. M. Yewell	2317 Garland	Ind	31,000.00
		B. Markowitz	23rd & Ky. Sts	Ind	31,000.00
		W. P. Todd	2100 W. Date St	Ind	21,000.00
		Geo. Kuhn	2339 W. Date St	Ind	21,000.00
		A. A. Grant	1107 S. 22nd St	Ind	23,000.00
		Wm. Yutz	2200 W. Maple	Ind	26,000.00
		David Hoffman	2202 Garland Ave	Ind	21,000.00
2298	2200 W. Oak St	Geo. Scott	1219 So. 18th St	Ind	18,000.00
		Eckerles Grocery	2301 Wilson St	Ind	31,000.00
		Allen & Moore	2201 W. Oak St	Ind	75,000.00
		Grines Grocery	2184 Dumesnil	Ind	13,000.00
		S. W. Brock	2100 Wilson St	Ind	16,000.00
		Allen Grocery	1828 W. Ormsby	Ind	16,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		R. L. Crossier	2225 W. Ormsby	Ind	$16,000.00
		E. Scott	2100 St. Louis Ave	Ind	32,000.00
2930	4600 So. 6th St				
3154	3032 So. 4th St	H. J. Roberts	762 So. Central	Ind	13,000.00
		Wm. Schwacter	3000 So. 3rd St	Ind	42,000.00
		Harrisons Mkt	3028 So. 4th St	Ind	18,000.00
		South Lou. Mkt	3018 So. 4th St	Ind	39,000.00
		Sam. Krietmon	3115 So. 4th St	Ind	25,000.00
4292	4508 Park Blvd	H. Marcell	4532 Park Blvd	Ind	31,000.00
		Len Wilson	4621 Park Blvd	Ind	31,000.00
		C. Fisk	4412 Lou. Ave	Ind	18,000.00
		W. Lippold	4701 Lou. Ave	Ind	20,000.00
		Beisler Bros	4358 Park Blvd	Ind	31,500.00
		J. W. Thomas	4346 Park Blvd	Ind	15,000.00
4474	2533 Greenwood	V. L. Dunn	26th & Howard	Ind	13,000.00
		A. McDowell	1028 So. 26th St	Ind	21,000.00
		R. Grenwell	25th & Osage	Ind	23,000.00
[fol. 218]		G. P. Stammell	1232 So. 26th St	Ind	48,000.00
4477	3102 Taylor Blvd	J. F. Jarosh	3331 Taylor Blvd	Ind	21,000.00
		Jetton & Son	Taylor & Central	Ind	31,000.00
		Frank Hartman	3296 Taylor Blvd	Ind	26,000.00
4484	3131 Virginia Ave				
4491	2830 So. 4th St	Chas. E. Toffe	521 Winkler	Ind	36,000.00
		A. J. Schmitt	2700 So. 4th St	Ind	36,000.00
		Ben Rosenblum	2732 So. 4th St	Ind	21,000.00
		Moorehead Grocery	2818 So. 4th St	Ind	15,000.00
		E. E. Linder	2901 So. 4th St	Ind	18,000.00
		E. P. Buchort	2932 So. 5th St	Ind	16,500.00
		S. O. Nichols	2723 So. 7th St	Ind	16,500.00
		E. E. Houseman	2918 So. 7th St	Ind	13,000.00
4493	3465 Taylor Blvd	Bessie Creason	4400 Taylor Blvd	Ind	26,000.00
		Geo. Slacter	3700 Taylor Blvd	Ind	26,000.00

		Wm. Betz	3469 Taylor Blvd	Ind	42,000.00
		T. Walker	423 Taylor Blvd	Ind	26,000.00
		J. C. Becker	1400 Berry Blvd	Ind	31,000.00
		C. E. Seifer	1416 Berry Blvd	Ind	28,000.00
		J. Ottersbach	4000 Taylor Blvd	Ind	5,000.00
		Greenerts Mkt	3800 Taylor Blvd	Ind	26,000.00
4639	1400 Hemlock	Millers Groc	3030 Southern Ave	Ind	28,000.00
		William Downs	3216 Kirby	Ind	31,000.00
		A. V. Terrill	32nd & Woodland	Ind	31,000.00
4764	1101 So. 18th St	J. A. Olt	18th & Garland	Ind	21,000.00
		Bills Mkt	18th & Oak St	Ind	16,000.00
		R. A. Warren	18th & Maple	Ind	31,000.00
:5151	1507 So. 18th St	H. Torstick	23 & Hill St	Ind	39,000.00
		Fust Grocery	1442 So. 18th St	"	52,000.00
		T. P. Kolbrier	1329 So. 18th St	"	78,000.00
		E. C. Schoff	1359 So. 18th St	"	21,000.00
		C. L. Misbach	18th & Hill	"	28,000.00
		Geo. Schneider	2339 Bolling Ave	"	15,00.000
		J. M. Rose	18th & Burnett	Ind	13,000.00
5159	3781 So. Parkway	Vaughns Mkt	3946 So. 3rd St	Ind	23,000.00
		J. G. Schuster	3758 So. 3rd St	"	26,000.00
		C. C. Cocke, Jr	3947 So. 4th St	"	18,000.00
		G. H. Buffett	4101 So. 3rd St	"	21,000.00

[fol. 219]

Kroger Stores, District #3

430	1606 Bardstown Rd	Deer Park Groc. Co	1759 Bardstown Rd	Ind	50,000.00
		J. John	1700 Bonnycastle	Ind	31,000.00
659	988 Barrett	Arch E. Eggen	1501 Winter Ave	Ind	75,000.00
		Ruffra Bros	1400 Hepburn Ave	Ind	100,000.00
1491	2042 Preston	Jno. Beckman	2039 So. Shelby	Ind	21,000.00
		Ising Bros	2205 So. Preston St	Ind	60,000.00
1648	2733 Bardstown Rd				
2430	2451 Bardstown Rd	Mike Schum	2301 Taylorsville Rd	Ind	46,000.00
		Herman Kerz	2307 Taylorsville Rd	Ind	46,000.00
		Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
2498	1101 Goss Ave	John Harstern	1357 So. Shelby	Ind	62,500.00
		F. A. Greishaber	1148 So. Shelby	Ind	260,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
2785	2227 Bardstown Rd	Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
		Mike Schum	2301 Taylorsville Rd	Ind	46,500.00
		Herman Kerz	2307 Taylorsville Rd	Ind	46,500.00
2954	1613 Norris Place	J. John	1700 Bonnycastle	Ind	30,000.00
3102	3131 Preston St	Jno. T. Echsner	2511 Preston St	Ind	36,000.00
		A. Ohlman	2901 " "	Ind	21,000.00
3397	1236 So. Shelby	Joe Meinart	Clay & St. Cath St	Ind	46,000.00
		Herman Pool	Logan & St. Cath	Ind	21,000.00
		J. A. Horton	1234 So. Shelby	Ind	28,000.00
		Jno. Hartstern	1357 So. Shelby	Ind	62,000.00
		Chris. Hartstern	1345 So. Shelby	Ind	26,000.00
		F. A. Greishaber	1148 So. Shelby	Ind	26,000.00
		Wm. Dreslane	701 Camp St	Ind	32,000.00
		Edw. Hanks	640 Camp St	Ind	21,000.00
		J. Schook Groc	1100 Ramers	Ind	46,000.00
3594	1908 Bardstown Rd	Adolph Hobbick	1868 Bardstown Rd	Ind	40,000.00
		Deer Park Gro. Co	Bardstown & Deer Park	Ind	50,000.00
4411	1933 So. 3rd St	H. G. Brooks & Co	1800 3rd St	Ind	400,000.00
		H. W. Stein	324 West Brandies	Ind	60,000.00
4490	901 Barrett	Wm. Strohm	918 Barrett	Ind	200,000.00
4799	1038 E. Burnett St				
5146	1512 Bardstown Rd	Heckman Groc. Co	1514 Bardstown Rd	Do Not Know	62,000.00
5164	801 Eastern Pkwy	Ising Bros	2205 So. Preston St	Ind	60,000.00
5550	963 Chas. St	Jake Hillman	Chas. & Kriger	Ind	60,000.00
		Stoll Grocery Co	1100 Milton	Ind	21,000.00
[fol. 220]		Kroger Stores, District #4			
384	528 So. 5th St	Snyders Grocery	562 So. 5th St	Ind	10,000.00
429	224 So. 4th St	Denunzios	345 W. Jefferson	Ind	52,000.00
452	1039 So. Brook	Scheffers Grocery	Brook & Caldwell	Ind	16,000.00
		Church's Grocery	Floyd & St. Catherine	Ind	16,000.00
		J. H. Kneady	Preston & St. Catherine	Ind	16,000.00
504	529 W. Oak St	Bass Market	7th & Oak St	Ind	21,000.00
		Shaikun's Grocery	7th & Zane St	Ind	18,000.00

		Moriarity Bros.	6th & Ky. St.	Ind.	60,000.00
		I. Kreitman	6th & Zane	Ind.	19,000.00
		Hardy Gro. Co.	5th & Oak	Ohio Valley Gro.	150,000.00
		W. O. Englander	7th & Ky. St.	" " "	32,000.00
1241	1159 So. 4th St.	H. Nuffer & Son	625 Magnolia	Ind.	50,000.00
1418	1271 So. Floyd St.	A. Hankie	Clay & Camp	Ind.	21,000.00
		R. A. Drislane	Clay & Camp	"	40,000.00
		G. A. Schneider	429 W. Ormsby	"	21,000.00
		J. W. Watson	Hancock & Camp	"	17,500.00
2439	978 So. 2nd St.	H. Franks	6th & Breck	Ind.	20,000.00
2612	1504 So. 7th St.	Danner Bros.	1505 So. 7th St.	Ind.	50,000.00
		Wm. E. Chick	7th & Shipp	Ind.	25,000.00
		S. Kellmann	1000 W. Hill	Ind.	15,000.00
		J. Adams	1100 W. Hill	Ind.	11,000.00
		M. D. Guelda	7th at 9th St.	Ind.	40,000.00
		M. Taylor	1116 W. Hill	"	10,500.00
		Louis Linker	1041 W. Hill	"	11,000.00
		Grimms Grocery	1462 So. 7th St.	"	75,000.00
		N. Wolders	1480 So. 7th St.	"	40,000.00
2787	1162 So. 3rd St.	H. G. Brooks & Son	3rd & Bloom	Ohio Valley	400,000.00
2841	654 So. 4th St.	Zapp's Groc. Co.	640 So. 4th St.	" "	100,000.00
2898	1527 So. 4th St.	C. W. Hall	5th & Lee	Ind.	20,000.00
		A. Hannish	5th & Lee	"	20,000.00
		W. Weinda	1454 So. 7th	"	15,000.00
3394	344 E. Oak St.	I. Farb	Preston & Oak St.	Ind.	16,000.00
		French's Gro.	Jackson & Oak St.	Ind.	25,000.00
		A. Schad	" "	Ind.	27,500.00
		Shelby Parkway Gro.	Preston & Shelby	Ind.	20,000.00
3414	861 So. 3rd St.	Wilkens Mkt.	5th & Breck	Ind.	24,000.00
		J. B. Strauss	4th & Broadway	Ohio Valley	350,000.00
3512	1501 So. 1st.	F. C. Slange	114 W. Hill St	Ind.	21,000.00
[fol. 221]					
3512	1501 So. 1st.	A. Anna Doll	238 E. Burnett	Ind.	15,000.00
4351	1398 So. 2nd	C. A. Young	2nd & Magnolia	Ohio Valley	250,000.00
5144	900 So. 1st				
5166	1201 So. 1st.	E. A. Altmans	2nd & Oak	Independent	15,000.00

[fol. 222]

EXHIBIT "A"—Continued
Kroger Stores, District #5

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
235	3405 W. Bdwy	Geo Numurer	35 & Michigan	Ind	13,000.00
		Abe Linker	31 & Bdwy	"	18,000.00
		Shawnee Gro. Co	34 & River Pk. Drive	"	47,000.00
		Hohman & Sons	34 & Bdwy	"	61,000.00
		Ruben Gro. Co	35 & Vermont	"	39,000.00
		W. G. Goings	30th & Michigan	"	10,000.00
		Robert & Back	30th & River Pk. Dr	"	10,000.00
		N. J. Osborne	30th & Michigan	"	10,000.00
785	2525 Portland Ave	Thos. McShane	25th & Ryan	"	20,000.00
		M. A. Carbone	23rd & Lytle	"	13,000.00
		Geo. Meyer	26th & Slevin	"	17,000.00
		Buechler & Fehrebach	26th & Elliott	"	13,000.00
		J. J. Logan	28th & Montgomery	"	16,000.00
		C. A. Buttler	21 & Portland	"	26,000.00
		Abe Keller	21 & Protland	"	16,000.00
		Willard Feller	26 & Portland	"	13,000.00
		John Von Allmen	25 & Portland	"	16,000.00
		Schulman Grocery Co	25th & Griffith	"	51,000.00
1401	4615 W. Mkt	G. E. Becker	41 & Market	"	60,000.00
		Hofsteter & Gunthner	42 & Market St	"	75,000.00
1455	2733 W. Bdway	Harry Davis	22 & Walnut	"	16,000.00
		Lewis Lechner	22 & Chestnut	"	21,000.00
1557	3321 W. Market	R. E. Haynes & Son	30th & Market	"	36,000.00
		Wm. Coch	29th & Market	"	18,000.00
		Henry Schock	227 N. 34th St	"	12,000.00
		Paul Muething	33rd & Rudd	"	10,000.00
		John Pontrich	34 & Market	"	52,000.00
		Guy Thurman	29th & Slevin	"	18,000.00
1696	3919 River Pk. Dr	Chas. Army	38th & River Pk. Dr	"	26,000.00
		Geo. Stevens Gro	37th & Vermont	"	10,000.00
1768	4034 W. Market	Frank Fust	41 & Cedar	"	17,000.00
		Hofsteter & Gunthner	43 & Market	"	75,000.00
		Chas. Regee	41 & Cedar	"	16,000.00

2363	2300 W. Market	Hohman & Son	24th & Jeff	"	52,000.00
		K. W. Spalding	22nd & Jeff	"	13,000.00
		J. Kopph, Jr	22nd & Market	"	10,000.00
		Joe Spelmiller	20th & Rowan St.	"	13,000.00
		J. W. Oldeges	24th & Rowand St.	"	13,000.00
[fol. 223]					
2363	2300 W. Market St.	Nicholas Wagner	23 & Duncan St.	Ind	13,000.00
		Geo. Killerman	22 & Market St.	"	23,000.00
		C. Rusch	21 & Market St.	"	31,000.00
		Miller Bros.	19 & Duncan	"	76,000.00
		Ollie Thorp	20th & Duncan	"	13,000.00
2917	3719 W. Bdwy	V. H. Durbin	Cecil & Chestnut	"	60,000.00
		Frank Fust	41 & Cedar	"	31,000.00
2921	3801 River Pk. Dr.	Orthobee Gro. Co.	34th & Cedar	"	30,000.00
		Ruben Gro. Co	35th & Vermont	"	39,000.00
		A. E. Boldsmith	38th & Vermont	"	21,000.00
		Chas. Army	38th & River Pk. Dr.	"	26,000.00
		Geo. Stevens Co.	37th & Vermont	"	10,000.00
3140	4321 Vermont	A. E. Goldsmith	38th & Vermont	"	21,000.00
		Chas. Regee	41 & Cedar St.	"	16,000.00
		G. E. Beker	41*th* & Market St.	Ohio Valley	44,000.00
		Hofstater & Gunthner	42nd & Market	Retail Merchants	75,000.00
		Frank Fust	41*th* & Cedar St.	James Gro. Co	17,000.00
4090	4311 W. Market	G. E. Beker	44th & Market	Ohio Valley	60,000.00
		Frank Fust	41*th* & Cedar	James Gro. Co.	17,000.00
		Hofsteter & Gunthner	42nd & Market	Retail Merchants	75,000.00
4381	4001 W. Bdway	A. E. Goldsmith	38th & Vermont	Ind	21,000.00
		Chas. Army	38th & River Pk. Dr.	"	26,000.00
		Geo. Stevens	37th & Vermont	"	10,000.00
		Ruben Gro. Co.	35th & Vermont	"	39,000.00
		V. H. Durbin	Cecil & Chestnut	"	60,000.00
4475	558 So. 20th St.	Sam Miller	20th & Cedar	"	13,000.00
		Geo. Gazel	20th & Madison	"	13,000.00
		Fred Miller	22nd & Mag	"	18,000.00
		W. T. Vaughan	19th & Chestnut	"	16,000.00
		J. C. Tuk	23 & Cedar St.	"	23,000.00
		B. R. Shera	22 & Magazine St.	"	13,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		M. L. Cohn	19th & Madison St	"	13,000.00
		Sm. Selman	20th & Magazine St	"	10,000.00
		J. S. McCown	21 & Cedar St	"	10,000.00
		J. C. Schuchard	21 & Walnut St	"	10,000.00
		Charley's Market	20th & Walnut St	"	29,000.00
		Geo. Minrath	20th & Jeff St	"	17,000.00
		Fred. J. Voll	22nd & Cedar	"	16,000.00
[fcl. 224]					
4479	2549 W. Market	M. H. Colman	27th & Market	Ind	21,000.00
		Mrs. B. Shulman	25th & Griffith	"	50,000.00
		Litchfield Gro. Co	26th & Main St	"	34,000.00
		Tony Litchfield	28th & Market	"	47,000.00
		Dan Weber	26th & St. Cecelia	"	18,000.00
		McDonald & Stevens	25th & St. Cecelia	"	23,000.00
		Fred Shanks	26th & Rowan	"	16,000.00
		G. H. Gunthner	26th & Jeff	"	23,000.00
		Marvin Shelburn	28th & Griffith	"	10,000.00
		J. W. Pruitt	26th & Jeff	"	10,000.00
		Jas. Schmidt	28th & Duncan	"	18,000.00
4620	2533 W. Walnut	M. Blier	24th & Walnut St	"	10,000.00
		Agnew Gro. Co	26th & Cedar	"	16,000.00
		Dan Hodge	26th & Madison	"	[illegible]00.00
		Schnepp Gro. Co	28th & Madison	"	47,000.00
		Monarch Gro. Co	27th & Chestnut	"	42,000.00
		H. Waith	28th & Jeff	"	23,000.00
		D. H. Cater & Sons	24th & Chestnut	"	26,000.00
		Harry Davis	25th & Walnut St	"	16,000.00
		Jos. Murkel	28th & Chestnut St	"	13,000.00
		D. Perilles	26th & Walnut	"	13,000.00
		Geo. Dillman	26th & Mag	"	13,000.00
4622	2839 Portland	J. W. Smith	1801 W. Pkway	"	18,000.00
		Phillyss Gro. Co	30th & Portland	"	17,000.00
		Sam Plank	29th & Baks St	"	16,000.00

		Geo. Beker	35th & Duncan	"		12,000.00
		Jos. C. Beker	34th & W. Pkway	"		60,000.00
		S. Davis	29th & Portland	"		60,000.00
		Jas. Zieser	37th & W. Pkway	"		40,000.00
		Mrs. B. Schulman	25th & Griffith	"		47,000.00
		Fred Davis	31 & Bank St	"		26,000.00
		Nick Weisenberg	34th & Bank St	"		13,000.00

[fol. 225]

Kroger Stores, District #6

1579	Elizabethtown, Ky	Walker & Miller	Elizabethtown, Ky	Independent		51,000.00
		Hawkins Grocery	"	"		52,000.00
		Clarks Home Grocery	"	"		52,000.00
		Adams Grocery	"	"		31,000.00
		Williams Grocery	"	"		23,000.00
		Joe Kirk	"	"		13,000.00
		L. H. Lee	"	"		13,000.00
2206	Bowling Green, Ky	J. C. Brownfield	1305 Center St. B. G. Ky.	"		52,000.00
		H. Willoughby	729 College St. " " "	"		31,000.00
4796	Bardstown, Ky	J. S. Smith	3rd Street. Bardstown, Ky	"		47,000.00
		Bardstown Grocery	3rd Street, "	"		73,000.00
		Rapier Grocery	" "	"		42,000.00
		Ballard & Ballard	" "	"		31,000.00
		Stoker & Smith	" "	"		36,000.00
5248	415 Park Row B. G. Ky.	S. Brown	12th & Adams St. B. G. Ky.	Retail Merch. Asso		52,000.00
		A. Gunnels	702 College St. " " "	" " "		42,000.00
		Chas. James	504 12th St. " " "	"		62,000.00
		Thomas Bros	210 Main St. " " "	"		78,000.00
		J. S. Cole	423 College St. " " "	Ind		31,000.00
		R. S. Cole	1246 Netwood St. " " "	Ind		21,000.00
		Beete Dobson	116 High St. " " "	Ind		16,000.00
		Hubert Ducket	1207 Broadway " " "	Ind		26,000.00
		Urey Dennis	Church St. " " "	Ind		21,000.00
		P. Holland	1238 Indianola " " "	Ind		23,000.00
		J. W. Hogan	625 Church St. " " "	Ind		21,000.00
		Hudson Bros	401 W. Main St. " " "	Ind		16,000.00

EXHIBIT "A"—Continued

City	Street & No.	Firm name	Address	Affiliation	Estimated annual sales
		F. L. Kister	875 Broadway St. B. G. Ky	Ind	31,000.00
		E. McDonald	322 College St. " " "	Ind	42,000.00
		McCormick	206 Main St. " " "	Ind	52,000.00
		A. H. McFarland	3rd & College " " "	Ind	42,000.00
		Park & McGoodwin	945 State St. " " "	Ind	62,000.00
		Mrs. J. Moltenberry	Fairview Ave. " " "	Ind	39,000.00
		Robald Bros	140 Main St. " " "	Ind	57,000.00
		Jack Russell	928 State St. " " "	Ind	42,000.00
		Siddens	1265 College St. " " "	Ind	50,000.00
		Tabor Bros	724 Fairview " " "	Ind	42,000.00
[fol. 226]					
5248	415 Park Row B. G. Ky	P. E. Tandy	115 13th St. B. G. Ky	Independent	31,000.00
		H. H. Welch	418 13th St., " " "	"	39,000.00
L-2	Hodgenville, Ky	C. H. Duckworth	Hodgenville, Ky	Unknown	32,000.00
		M. C. Jolly	" "	"	31,000.00

EXHIBIT "B"
L-i-c-e-n-s-e
District #1

[fol. 227]

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg dealers	City grocery
689	1280 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1038	St. Matthews, Ky	.....	6.00	.....	11.00	11.00	.....	.....	....
1638	603 E. Walnut St	10.00	6.00	.....	.....	11.00	25.00	.....	....
1669	1609 Eastern Pkway	10.00	6.00	.....	.....	11.00	.....	.....	....
1871	3300 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2116	2337 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
2533	2728 Frankfort Ave	10.00	6.00	.....	.....	11.00	25.00	.....	....
2896	2532 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
3067	1758 Frankfort Ave	10.00	6.00	.....	.....	11.00	.....	.....	....
3157	975 Baxter Ave	10.00	6.00	.....	.....	11.00	25.00	.....	....

3165	1381 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
3215	744 E. Broadway	10.00	6.00	10.00	11.00	11.00	.....	.....	....
3489	1200 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
4399	1882 Frankfort Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
4648	1603 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5009	St. Matthews, Ky.	.....	6.00	.....	11.00	11.00	.....	.....	....
5137	2912 Frankfort Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
[fol. 228]				District #2					
691	1038 So. 32nd St.	10.00	6.00	.....	.....	11.00	.....	.....	....
698	306 Woodlawn Ave.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
786	2757 Dumesnil St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1777	2127 W. Ky. St.	10.00	6.00	.....	.....	11.00	.....	.....	....
2298	2200 W. Oak St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2930	4600 S. Sixth St.	10.00	6.00	.....	.....	11.00	.....	.....	....
3154	3032 So. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
4292	4508 Park Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4474	2533 Greenwood	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4477	3102 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4484	3131 Virginia	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4491	2830 So. 4th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4493	3467 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4639	1400 Hemlock St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4764	1101 So. 18th St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
5151	1507 So. 18th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5159	3781 Sou. Pkwy	10.00	6.00	.....	.....	11.00	25.00	.....	....
[fol. 229]				District #3					
430	1606 Bardstown	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
659	988 Barrett Ave.	10.00	6.00	.....	.....	11.00	.....	.....	....
1491	2042 Preston St.	10.00	6.00	.....	.....	11.00	.....	.....	....
1648	2733 Bardstown	.....	6.00	.....	11.00	11.00	.....	.....	....
2430	2451 " Rd.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2498	1101 Goss Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2785	2227 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....

EXHIBIT "B"—Continued

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg Dealers	City grocery
2954	1613 Norris Place	10.00	6.00	.....	.....	11.00	.....	.....	....
3102	3131 Preston St.	.....	6.00	.....	.....	11.00	.....	.....	....
3397	1236 So. Shelby	10.00	6.00	.....	.....	11.00	25.00	.....	....
3594	1908 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
4411	1933 So. Third St.	10.00	6.00	.....	.....	11.00	.....	.....	....
4490	901 Barrett Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4799	1038 E. Burnett	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5146	1521 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
5164	801 Eastern Pkway	10.00	6.00	.....	.....	11.00	25.00	.....	....
5550	963 Charles St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
[fol. 230]				District #4					
384	528 S. Fifth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
429	224 S. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
452	1039 S. Brook St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
504	529 W. Oak St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
1241	1159 S. Fourth St.	10.00	6.00	.....	.....	11.00	.....	.....	....
1418	1271 S. Floyd St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
2439	978 S. Second St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2612	1504 S. Seventh St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2787	1162 S. Third St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2841	654 S. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2898	1527 S. Fourth St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
3394	344 E. Oak St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
3414	861 S. Third St.	10.00	6.00	.....	.....	11.00	.....	.....	....
3512	1501 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....
4351	1398 S. Second St.	10.00	6.00	.....	.....	11.00	.....	.....	....
5144	900 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....
5166	1201 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....

[fol. 231]

District #5

235	3403 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
785	2525 Portland Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
1401	4615 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1455	2133 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
1557	3321 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1696	3919 River Park Dr.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1768	4034 W. Market St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2363	2300 W. Market St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2917	3719 W. Broadway	10.00	6.00	.....	.....	11.00	25.00	.....	....
2921	3801 W. Chestnut	10.00	6.00	.....	.....	11.00	.....	.....	....
3140	4321 W. Madison	10.00	6.00	.....	.....	11.00	25.00	.....	....
4090	4311 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4381	4001 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
4475	588 S. 20th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4479	2549 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4620	2533 Walnut St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4622	2839 Portland Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....

[fol. 232]

District #6

1579	Public Square, Elizabethtown, Ky.	.....	6.00	25.00	11.00	11.00	.....	2.00	....
2206	935 College St., Bowling Green, Ky.	.....	6.00	.....	11.00	11.00	15.25	.....	15.25
4796	Third St., Bardstown, Ky.	25.00	6.00	25.00	11.00	11.00	.....	2.00	20.00
5248	415 Park Row, Bowling Green, Ky.	.....	6.00	.....	.....	11.00	15.25	2.00	15.25

The above represents all Kentucky stores in Districts 6, 7 and 8.

[fol. 233] AFFIDAVIT OF GILBERT J. SCHNEIDER

Lexington, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Fayette, ss:

Mr. Gilbert J. Schneider being first duly sworn says as follows:

I am 32 years of age and live with my family at Lexington, Kentucky. I have been employed by The Kroger Grocery & Baking Company for the last 16 years. I started with the Kroger organization as a store boy. Later I became a clerk in the store and then Store Manager. I acted as supervisor for 2½ years over district 12 working out of the Louisville Branch of The Kroger Grocery & Baking Company and for the last 15 months I have been Superintendent, having charge of districts 9, 10, 11, and 12.

As supervisor over district 12, I was thoroughly acquainted with the Kroger stores in the district and with the stores competing with Kroger. My duties as Superintendent consist of looking after sales, see that stores are stocked with the proper merchandise and keep in touch with what competitors in my territory are doing. In order to keep in close touch with what competitors are doing, I often have occasion to shop in their stores in order to determine prices they are charging and to get an idea what stock they carry and what business they are doing. Because of my duties and because of my familiarity with the locations of the stores competing with Kroger's, I am familiar with the retailing of groceries and meats in the counties of—

[fol. 234]

Fayette,	Marion,	Washington,
Pulaski,	Belle,	Boyd,
Whitley,	Lincoln,	Rock Castle,
Harlan,	Laurel,	Owen,
Mercer,	Franklin,	Carroll,
Shelby,	Henry,	Jessamine,
Garret,	Oldham,	Scott,
Montgomery,	Estill,	Madison,
Clark,	Bourbon,	Woodford.

I am acquainted with the number of grocery stores in my territory, the affiliations of the groceries, the character of the merchandise sold in the stores, the competitive condi-

tions in the counties, and the taxes to which the stores are subject, and I am able to estimate the approximate gross sales of the various stores located in the districts.

The Kroger Grocery & Baking Company owns and operates 63 stores in districts 9, 10, 11, and 12 located as shown in column 1 and 2 on exhibit A which is attached hereto. These stores compete directly with other grocery stores located in the same cities and towns and which are in the immediate vicinity of the Kroger stores. On exhibit A there is listed in column- 3 and 4 the principal competitor over each Kroger store over which I have supervision. In column 5, I have listed the affiliation of each store and in column 6 the estimated annual sales of each competitive store.

The average sales of each Kroger store in the territory over which I supervise, is approximately $50,000.00 a year or $1,000.00 a week.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross sales of the Kroger store in that locality:

Kroger Store, Harlan, Ky., Gross sales approximately	$60,000.00
Competing Store, W. H. Pennington, Gross sales approximately	100,000.00
Kroger Store, Middlesboro, Ky., Gross sales approximately	65,000.00
Competing Store, Shoffner Gro. Co., Gross sales approximately	100,000.00
Kroger Store, Danville, Ky., Gross sales approximately	55,000.00
Competing Store, W. B. Martin, Gross sales approximately	90,000.00
Kro. Store, 641 E. Main, Lexington, Ky., Gross sales approximately	58,000.00
Competing Store, Clay & W. Main, Lex., Gross sales approximately	100,000.00

In every case the stores operated by the Kroger Grocery & Baking Co. and the stores operated by its competitors han- [fol. 235] dle a similar line of merchandise and deal with the same public. There is no monopoly in the grocery business in the state of Kentucky in the district under my supervision. There are a great number of stores in the field that is highly competitive. Each Kroger store over which I have charge is in direct competition with other stores in the immediate vicinity.

All of the stores under my supervision sell soft drinks, cigarettes, oleomargarine and some candle eggs. The license taxes which each Kroger Store pays are listed on exhibit B attached hereto. In each case the sum total of license taxes amounts to about $50.00. Almost all the stores competing with Kroger handle soft drinks, cigarettes, oleo-

margarine, and a great many of them candle eggs. Their license taxes would be about the same as the taxes which Kroger has to pay.

The average sales of competitive stores owned by individuals or corporations which do not own more than one store does not exceed $50,000.00 and a good many of them have sales around $25,000.00.

In Campbellsville, Kentucky, W. R. Hoskins does about $75,000.00 worth of business a year. Under the Gross Sales Tax law his sales would be taxed at 1/20th of 1% and this tax would amount to about $37.50. Hoskins' Grocery sells oleomargarine, cigarettes, and soft drinks. His deductable tax therefore would be the same as the deductable tax of the Kroger store at Campbellsville and would be about $50.00. As a result, the grocery operated by W. R. Hoskins would pay no tax. We operate a grocery in Campbellsville which is competing with Hoskins' store. It does about $40,000.00 worth of business. Although we have a right to the same deduction as Hoskins, we would still have to pay a tax because our sales are added to the sales of all Kroger stores in the state of Kentucky in order to determine the rate of taxes. As a result our store is subject to a 1% tax on its sales which would amount to about [fol. 236] $450.00 a year. After the deductions are made it still would have to pay $400.00 a year.

In Franklin County we operate a grocery store at 208 Main Street. We have another store at 211 St. Clair which is just around the corner. We operate a third store at 311 St. Clair which is within one and a half blocks of the other two stores. The Moore grocery is located in the same block. Each of our three stores does about $50,000.00. The Moore Grocery does the same amount of business a year. All four stores sell cigarettes, and oleomargarine. The tax on the Moore grocery would be $25.00 and it would be completely erased by the deductions which they are allowed to take. In regard to the three Kroger stores, however, the deduction would not relieve them from paying the tax but instead each store would be subject to the tax of about $400.00.

In the city of Lexington, Alex Hughes operates a grocery at the corner of Walnut and East Second Street. This store is one block from the Kroger store which I supervise and it competes directly with the Kroger store. The gross

sales in Alex Hughes' store is estimated about $60,000.00 a year. He would not be subject to any tax because of the deductions which he is allowed to take. Our store at 3rd and Walnut has a gross sales of about $21,000.00 or less than half the sales of Alex Hughes. However, our store would have to pay a tax of $400.00. The same situation exists in regard to every store over which I have supervision and in each case competitors who own no other stores do not pay any tax but the Kroger store is subjected to a tax of $400.00.

A $400.00 tax on each store is oppressive and prohibitive. Each store operates on a basis of a small margin of profit which is not over 1½ to 2% on gross sales. It is therefore practically impossible to operate any store at a profit and pay $400.00 tax per store. It would be impossible to increase business because the small margin on which the increased business would be done would be all eaten up by the [fol. 237] tax. Any new store opened up by Kroger in the territory under my supervision would be subject to the 1% tax on all of its sales. However, a competitor who operates only one store could increase his business or open up a new store without subjecting himself to any tax. Many stores are under long term leases and if they would be closed heavy losses would result. If this heavy tax is imposed, our competitors would be able to undersell us by approximately 1% but they would not have to pay any tax on the increased business which they would get as a result.

Many of the competitors of the Kroger stores under my supervision are now members of cooperative associations. I have listed the affiliation of these stores in column 5 of exhibit A.

Independent Grocers Alliance is an important voluntary cooperative association operating in the territory over which I have supervision. Independent Grocers Alliance has some stores outside of my district in the state of Kentucky. I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every store in the state, that those merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of cooperative associations pay nothing. In spite of this fact they enjoy the advantages which the stores owned by Kroger

have as a result of being members of the Kroger organization. They secure the benefits of mass buying, mass merchandising, mass advertising, and other economies.

Each member is furnished with window posters and literature in regard to the proper conduct of grocery business the same as Kroger stores are furnished from central headquarters. Special merchandise broadsides and bulletins for sales campaigns are sent to members of Independent Grocers Alliance by the central headquarters. Each member of Independent Grocers Alliance has common [fol. 238] newspaper advertising in the city of Lexington, that is, one advertising article is inserted for all Independent Grocers Alliance stores in the city of Lexington. There is attached, a marked exhibit C, copy of an advertisement that appeared in a Lexington newspaper by Independent Grocers Alliance. The store fronts of each member of Independent Grocers Alliance bear the insignia "I. G. A.". They have common store fronts and can be easily recognized as "I. G. A." stores. The central headquarters send special supervisors who cooperate with the retailer in assisting and developing of the business. These supervisors are experts who advise the retailers in regard to proper methods for increasing sales.

Under the Kentucky Sales Tax Statute, each member of the Independent Grocers Alliance is treated as a separate unit and is not forced to aggregate his sales with the other members of the association. As a result, his deductions relieve him from the payment of any tax. Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent, and with the goods which it purchases and credited with the sales it makes. However, the Kentucky Sales Tax Statute does not treat the Kroger stores as separate units but aggregate the sales of all the stores, thus subjecting each store to a 1% tax on its gross sales.

Gilbert J. Schneider.

Sworn to before me this 5th day of January, 1931. Roy Forman, Notary Public of Fayette County, Kentucky. Notary Public, Fayette Co., Ky. My Commission expires Aug. 20, 1931. (Seal Roy Forman, Notary Public, Fayette County, Ky.)

District No. 9

EXHIBIT "A"

KROGER STORES — PRINCIPAL INDEPENDENT COMPETITORS

Store No. CITY	STREET AND NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky. #2130	509 E. Maxwell	R. T. Coons	High & Kentucky Sts.	Ind.	37,000.00
		J. L. Rue & Sons,	Woodland & Euclid Aves.	Ind.	80,000.00
2154	216 E. 7th St.	T. J. Burke	7th & Maple Ave.	Ind.	26,000.00
		F. L. Totten	746 Maple Ave.	Ind.	21,000.00
2185	934 S. Limestone	H. B. Heathman	Lime & Virginia Aves.	Ind.	36,500.00
2245	383 S. Broadway	Kelly-Hunt	Mill & Maxwell Sts.	Ind.	42,000.00
		Andrew B. Sallee	Broadway & High Sts.	Ind.	45,000.00
2522	148 N. Broadway,	Hart Brothers	316-18 W. Short St.	Ind.	95,000.00
		J. T. Mallory	474 N. Broadway	Ind.	50,000.00
2662	1190 N. Limestone	W. E. Allender	Bryan Station Pike	I.G.A.	30,000.00
2704	208 E. Third St.	J. A. Willis & Son	Third & Jefferson	Ind.	30,000.00
		C. L. Duvall	340 Race St.	Ind.	20,000.00
3060	500 E. Third St.	Holbrook Co.	501 E. Third St.	Ind.	25,000.00
		John McGarvey	561 W. Third St.	Ind.	25,000.00
3062	112 N. Hanover	Holman Gro. Co.	Cramer & Victory Ave.	I.G.A.	52,000.00
		J. T. Robertson	Cramer & Hanover Aves.	Ind.	30,000.00
		I. H. Gum	Walton & Cramer Ave.	Ind.	40,000.00
5226	Maxwell & Woodland	F. S. Johns	347 LaFayette Ave.	I.G.A	35,000.00
		Jack-Dodd	349 Clifton Ave.	Ind.	35,000.00
		Service Grocery Co.	Columbia & Rose Sts.	Ind.	30,000.00
5227	208 E. Main St.	None			
5228	145 N. Limestone	J. T. Looney	262 E. Short St.	Ind.	45,000.00
		Alex Hughes	Walnut & E. 2nd St.	Ind.	60,000.00
		Leslie Rue	5th & Walnut Sts.	Ind.	35,000.00
5232	852 E. High St.	Spicer Gro. Co.	High & Clay Sts.	I.G.A.	50,000.00
		Butler Gro. Co.	846 E. High St.	Ind.	30,000.00

[fol. 240]

District No. 9 cont.

EXHIBIT "A"

KROGER STORES

PRINCIPAL INDEPENDENT COMPETITORS

Store No. City.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky.					
5245	600 N. Limestone St.	S. Rosenberg	301 E. 5th St.	Ind.	35,000.00
		L. W. Rue	Fifth & Walnut Sts.	Ind.	30,000.00
5246	102 E. Maxwell	L. Woods	Limestone & Maxwell	I.G.A.	20,000.00
		Warren Brothers	201-203 S. Limestone	Ind.	80,000.00
		W. B. Griggs	563 S. Limestone	Ind.	50,000.00

[fol. 241]

District No. 10

[101.241]

District No. 10

KROGER STORES

EXHIBIT "A"

PRINCIPAL INDEPENDENT COMPETITORS

CITY Store No.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
703	Owingsville, Ky.	Estill & Thomas	Owingsville, Ky.	Ind.	75,000.00
		Ray Spencer	Owingsville, Ky.	Ind.	35,000.00
861	Paris, Ky	Cook Gro. Co.	Paris, Ky.	Ind.	75,000.00
2537	Paris, Ky.	J. W. Brone	Paris, Ky.	I.G.A.	40,000.00
5206	Paris, Ky.	Chas. Green	Paris, Ky.	Ind	21,000.00
946	Winchester, Ky.	H. O. Ro Gro. Co.	Winchester, Ky.	Ind.	75,000.00
2086	Winchester, Ky.	Smith Gro. Co.	Winchester, Ky.	Ind.	30,000.00
5240	Winchester, Ky.	R. B. Brown	Winchester, Ky.	Ind.	35,000.00
1708	Mt. Sterling, Ky.	T. K. Barnes	Mt. Sterling, Ky.	I.G.A.	28,000.00
		H. B. Ringo	Mt. Sterling, Ky.	Ind.	28,000.00
		W. O. Mackie	Mt. Sterling, Ky.	Ind.	18,000.00
3254	Richmond, Ky.	Joe Groc. Co.	Richmond, Ky.	Ind.	50,000.00
		Ora Hachett	Richmond, Ky.	Ind.	45,000.00
		Home Groc. Co.	Richmond, Ky.	Home Gro.Co. Lexington,Ky.	45,000.00
		Kinkead Grocery	Richmond, Ky.	Ind.	21,000.00
3369	Irvine, Ky.	Broadway Gro. Co.	Irvine, Ky.	Ind.	50,000.00
		Wilson Grocery	Irvine, Ky.	Ind.	30,000.00
3417	Georgetown, Ky.	M. C. Cash Grocery	Georgetown, Ky.	Ind.	42,000.00
5222	Georgetown, Ky.	Morris & Crenshaw	Georgetown, Ky.	Ind.	50,000.00
		Floyed Robinson	Georgetown, Ky.	Ind.	40,000.00
5225	Short & B'way, Lexington, Ky.	H. B. Royse	586 W. Main, Lexington, Ky.	Ind.	55,000.00
		J. B. Wallace	592 W. Main, Lexington, Ky.	Ind.	45,000.00
		Sharkeys Groc.	752 W. Main, Lexington, Ky.	Ind.	30,000.00
5229	641 E. Main, Lexington, Ky.	L. F. Rue Groc.	Main & Clay Sts.,Lexington,Ky.	Ind.	100,000.00
5231	1035 S. Limestone,Lexington,Ky.	None			
2660	521 Georgetown St.Lexington, Ky.	B. N. Foley	535 Georgetown St.Lexington,Ky .	Ind.	40,000.00
		Roy Gaines	4th & Georgetown, Lexington, Ky.	I.G.A.	75,000.00
		Robertson Gro.	383 Georgetown St.,Lexington, Ky.	Ind.	30,000.00

[fol. 2421]

District #11.

E-X-H-I-B-I-T a

KROGER STORES

CITY	STREET & NO.
446	Owenton, Ky.
721	Harrodsburg, Ky.
2093	Frankfort, Ky.
2299	Lawrenceburg, Ky.
2302	Versailles, Ky.
2513	Carrollton, Ky.
2544	Shelbyville, Ky.
3061	Midway, Ky.
3182	Eminence, Ky.
3221	Nicholasville, Ky.
3421	Frankfort, Ky.
3656	Lancaster, Ky.
4021	Wilmore, Ky.
4518	Frankfort, Ky.
5221	Frankfort, Ky.
5238	Shelbyville, Ky.
5598	LaGrange, Ky.

PRINCIPAL INDEPENDENT COMPETITORS.

FIRM	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Owenton Grocery Co.	Owenston, Ky.	Ind.	62,000.00
Balls Grocery	Owenton, Ky.	Ind.	20,000.00
Van Arsdal Grocery	Harrodsburg, Ky.	Ind.	31,000.00
Peoples Grocery	Harrodsburg, Ky.	Ind.	31,000.00
Moore Grocery	Frankfort, Ky.	Ind.	50,000.00
Martins Grocery	Lawrenceburg	Ind.	30,000.00
Smith Grocery	Lawrenceburg	Ind.	28,000.00
Van Meter Grocery	Lawrenceburg	Ind.	21,000.00
Howard Grocery Co	Versailles, Ky.	Ind.	40,000.00
Blue Grass Groc.	Versailles, Ky.	Ind.	42,000.00
Redman Groc. Co.	Versailles, Ky.	Ind.	30,000.00
Wood Grocery Co.	Carrollton, Ky.	Ind.	33,000.00
Thomas Grocery	Carrollton, Ky.	Ind.	26,000.00
Hill Grocery	"	Ind.	45,000.00
Blakemore Groc.	Shelbyville, Ky.	Ind.	75,000.00
Wilmoth Groc.	"	Ind.	30,000.00
Finchs Groc.	"	Ind.	26,000.00
Noel Bros. Groc.	Midway, Ky.	Ind.	26,000.00
W. A. Gatrell	Midway, Ky.	Ind.	30,000.00
Fred Berry Groc.	Eminence, Ky.	Ind.	58,000.00
Terrill Groc.	Eminence, Ky.	Ind.	30,000.00
T.C.Willis Co.	Nicholasville, Ky.	Ind.	47,000.00
Cobbs Groc.	Nicholasville, Ky.	Ind.	18,000.00
Funk Groc.	Nicholasville, Ky.	Ind.	26,000.00
Home Groc. Co.	Frankfort, Ky.	Home Gro.Co.	30,000.00
Spencer Co.	Lancaster, Ky.	Ind.	33,000.00
McRoberts Groc.	Lancaster, Ky.	Ind.	26,000.00
Kahn Groc.	Wilmore, Ky.	Ind.	30,000.00
Deitz Groc.	"	Ind.	25,000.00
Little Groc.	"	Ind.	20,000.00
Marshalls Groc.	Frankfort, Ky.	Ind.	36,000.00
Dewitt Grocery	Frankfort, Ky.	Ind.	25,000.00
Wilmoth Groc.	Shelbyville, Ky.	Ind.	30,000.00
Finchs Grocery	"	Ind.	26,000.00
Barr Groc.	LaGrange, Ky.	Ind.	26,000.00
Ballard Groc.	"	Ind.	10,500.00
Jennings Groc.	"	Ind.	20,000.00

District #12

EXHIBIT "A"

KROGER STORES — PRINCIPAL INDEPENDENT COMPETITORS

CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
174	Campbellsville, Ky.	W. R. Hoskins	Campbellsville, Ky.	Ind.	75,000.00
		Callison Groc.	Campbellsville, Ky.	Ind.	70,000.00
1287	Somerset, Ky.	Fletcher Groc.	Somerset, Ky.	"	60,000.00
		W. Setton	Somerset, Ky.	I. G. A.	70,000.00
		G/ Mc Kinnery	"	Ind.	50,000.00
2208	Harlan, Ky.	Clarence Saunders	Harlan, Ky.	Ind.	65,000.00
		W. H. Pennington	"	"	100,000.00
		Smith Groc. Co.	"	"	60,000.00
		Moss. Groc. Co.	"	"	40,000.00
3364	Danville, Ky.	Shiars Cure	Danville	Ind.	45,000.00
		Jones, Bros.	"	I.G.A.	60,000.00
		R. Foley	"	Ind.	50,000.00
		W. D. Lunford	"	Ind.	40,000.00
3368	Mt. Vernon, Ky.	Dows Meat Market	Mt. Vernon, Ky.	"	26,000.00
		John Rowe	Mt. Vernon, Ky.	"	48,000.00
		George Parrett	"	"	25,000.00
3422	Stanford, Ky.	E. B. Campbell	Stanford, Ky.	"	55,000.00
		Goods Grocery	"	"	23,000.00
		John Warner	"	"	45,000.00
3603	Pineville, Ky.	City Market	Pineville, Ky.	I.G.A.	40,000.00
		Henry Slusher	"	Ind.	50,000.00
3665	Lebanon, Ky.	B. B. Grocery	Lebanon, Ky.	"	70,000.00
		Comstock Groc.	"	"	60,000.00
		Molon Groc.	"	"	90,000.00
3677	Springfield, Ky.	McElroy & Shoder	Springfield, Ky.	"	75,000.00
		Tatum & Robertson	"	"	73,000.00
		Barnett Grocery Co	"	"	50,000.00
3752	London, Ky.	Pennington Bros.	London, Ky.	Ind.	40,000.00
		Joe. Smith	"	"	35,000.00
		James Carrol	"	"	40,000.00
3881	Middlesboro, Ky.	Owsley & Son	Middlesboro, Ky.	"	100,000.00
		Schneider & Son	"	"	55,000.00
		S. Latliff	"	I.G.A.	40,000.00
		H. Latliff	"	I.G.A.	40,000.00
		W. Cunningham	"	I.G.A.	30,000.00
		S. Hoffners Gro.	"	I.G.A.	100,000.00
3906	Pineville, Ky.	Gatliff Cash Store	"	Ind.	50,000.00

[fol. 244]

District #12
Continued.

E-X-H-I-B-I-T "A"

KROGER STORES		PRINCIPAL INDEPENDENT COMPETITORS			
CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
4573	Somerset, Ky.	Boston Grocery	Somerset, Ky.	Ind.	78,000.00
5206	Corbin, Ky.	Gabbard & Pennington	Corbin, Ky.	Ind.	50,000.00
		Chapples Grocery	Corbin, Ky.	I.G.A.	40,000.00
		W. M. Stonley	Corbin, Ky.	Ind.	45,000.00
5208	Danville, Ky.	W. B. Martin	Danville, Ky.	Ind.	90,000.00

[fol. 245]

EXHIBIT "B"
Dist. #9

LICENSE

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarettes	County Cigarettes	County Oleo	City Meat	Egg Dealers	City Grocery
2130	509 E. Maxwell St. Lexington, Ky.		6.00		11.00	11.00			30.00
2184	216 E. Seventh St. "		6.00		11.00	11.00			30.00
2185	934 S. Limestone St. "		6.00		11.00	11.00			30.00
2245	383 S. Broadway St. "		6.00		11.00	11.00			30.00
2522	148 N. Broadway "		6.00		11.00	11.00			30.00
2662	1190 N. Limestone "		6.00		11.00	11.00		2.00	30.00
2704	208 E. Third St. "		6.00		11.00	11.00			30.00
3060	500 E. Third St.. "		6.00		11.00	11.00			30.00
3062	112 N. Hanover St. "		6.00		11.00	11.00			30.00
5226	Maxwell & Woodland "		6.00		11.00	11.00			50.00
5227	208 E. Main St. "		6.00		11.00	11.00			50.00
5228	145 N. Limestone "		6.00			11.00			40.00
5232	852 E. High St. "		6.00		11.00	11.00			40.00
5245	600 N. Limestone "		6.00			11.00			40.00
5246	102 E. Maxwell St. "		6.00			11.00			40.00

EXHIBIT "B"
Dist. 10

LICENSE

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarette	County Cigarette	County Oleo	City Meat	Egg Dealers	City Grocery
703	Owingsville, Kyl		6.00		11.00	11.00		2.00	
861	800 Main St., Paris, Ky.	25.00	6.00	10.00	11.00	11.00		2.00	25.00
946	Main St. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
1708	Mt. Sterling, Ky.		6.00	25.00	11.00	11.00		2.00	
2086	Lex.Ave. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
2537	715 Main, Paris, Ky.	25.00	6.00	10.00	11.00	11.00	10.00	2.00	25.00
2660	521 Georgetown St.Lexington,Ky.		6.00		11.00	11.00			30.00
3254	Richmond, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3369	Irvine, Ky.	5.00	6.00	10.00	11.00	11.00		2.00	20.00
3417	Georgetown, Ky.		6.00	15.00	11.00	11.00	15.25		50.00
5222	146 Main St. Georgetown, Ky.		6.00			11.00		2.00	50.00
5231	1035 S.Lime, Lexington, Ky.		6.00		11.00	11.00			40.00
5225	Short & B'way,Lexington, Ky.		6.00		11.00	11.00			50.00
5229	641 E. Main, Lexington, Ky.		6.00		11.00	11.00			40.00
5236	707 Main St.,Paris, Ky.		6.00			11.00		2.00	25.00
5240	25 E. Main, Winchester, Ky.		6.00			11.00		2.00	15.00

[fol. 247]

District #11 EXHIBIT "B"

L-I-C-E-N-S-E

STORE NO.	ADDRESS	CITY SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	COUNTY OLEO	CITY MEAT	EGG DEALER	CITY GROCERY	MILL FEED
446	Owenton, Ky.	25.00	6.00	5.00	11.00	11.00		2.00	25.00	
721	Harrodsburg, Ky.		6.00	5.00	11.00	11.00		2.00		
2093	208 Main St., Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
2299	Lawrenceburg, Ky.		6.00		11.00	11.00		2.00	10.00	
2302	Versailles, Ky.	25.25	6.00		11.00	11.00	50.25	2.00		
2513	Carrollton, Ky.	15.00	6.00		11.00	11.00	10.00	2.00		
2544	Shelbyville, Ky.	10.00	6.00		11.00	11.00		2.00	40.00	
3061	Midway, Ky.		6.00		11.00	11.00		2.00		
3182	Eminence, Ky.	15.00	6.00	15.00	11.00	11.00		2.00	20.00	
3221	Nicholasville, Ky.	10.00	6.00	25.00	11.00	11.00		2.00	20.00	
3421	212 Second St. Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
3656	Lancaster, Ky.	5.00	6.00	15.25	11.00	11.00		2.00		
4021	Wilmore, Ky.	10.00	6.00	52.50	11.00	11.00		2.00	20.00	5.00
4518	311 St. Clair St, Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00	25.00	2.00	20.00	
5221	Frankfort ,Ky.	5.00	6.00			11.00	25.00	2.00	20.00	
5238	Shelbyville, Ky.		6.00			11.00	25.00	2.00	50.00	
5393	LaGrange, Ky.	5.00	6.00		11.00	11.00		2.00	10.00	

District #12 EXHIBIT "B"

L-I-C-E-N-S-E

STORE NO.	ADDRESS	City SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	CO. OLEO	CITY MEAT	EGG DEALER	CITY GROCERY
174	Campbellsville, Ky.	20.00	6.00		11.00	11.00		2.00	
1287	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
2208	Harlan, Ky.	12.00	6.00	12.00	11.00	11.00	7.00		22.00
3364	Danville, Ky.	25.00	6.00	12.00	11.00	11.00		2.00	20.00
3368	Mt. Vernon, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3422	Stanford, Ky.		6.00		11.00	11.00		2.00	
3603	102 Virginia Pineville, Ky.	6.00	6.00	11.00	11.00	11.00	7.00		20.00
3665	Lebanon, Ky.	6.00	6.00	50.00	11.00	11.00		2.00	
3677	Springfield, Ky.	10.00	6.00		11.00	11.00			10.00
3752	London, Ky.		6.00			11.00		2.00	5.00
3881	Middlesboro, Ky.	10.00	6.00	15.00	11.00	11.00	15.00	2.00	20.00
3906	Pineville, Ky.	6.00	6.00	11.00	11.00	11.00		2.00	20.00
4573	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
5206	Corbin, Ky.	5.00	6.00		11.00	11.00			10.00
5208	Danville, Ky.	25.00	6.00			11.00		2.00	20.00

[fols. 249 & 250] EXHIBIT "C"

[fol. 251] AFFIDAVIT OF D. T. PETTY

Evansville, Indiana.

STATE OF INDIANA,
County of Vanderburg, ss:

Mr. D. T. Petty being first duly sworn says as follows:

I am 31 years of age and live with my family in Evansville, Indiana. I have been engaged in the grocery business about 9 years and the last 6 years I have had charge of district 14 of the Louisville Branch of the Kroger Grocery & Baking Company. This particular district was part of the organization of Piggly Wiggly Valley Company and at that time I was supervisor for that concern.

There are 6 stores owned and operated by The Kroger Grocery and Baking Company in this territory which comprises the counties of Davies, Hopkins, Henderson, Christian. As Superintendent, I visit each of these stores at least once every two weeks. My duties consist of selecting managers, checking the stock in the stores, and the sales made by each particular store. I advise the managers in regard to merchandising problems and I keep in close touch with the business done by our competitors. I often have occasion to stop in their stores and in this way I have a general idea of the stock they carry, the number of clerks they employ, and the amount of business they do. By reason of my duties and because of my familiarity with the location of the stores operated by competitors of The Kroger Grocery and Baking Company in my territory, I can estimate the approximate yearly sales of these competitors and the affiliation of almost all of them. The average annual sales of each of the Kroger stores that I supervise [fol. 252] is about $40,000.00.

The Kroger Grocery & Baking Company operates two stores in Owensboro, Kentucky which are under my supervision. One is located at 116 Second Street and the other store is at 312 Fredrica Street. The principal independent competitors who operate only a single store are as follows:

Frederica Market, Independent, located on Frederica Street whose sales I estimate at $60,000.00 a year.

Thomas Bader at West Fourth Street whose annual sales I estimate at $80,000.00.

J. H. McLimore on West 9th Street has a store of which the sales are about $25,000 according to my estimate. J. H. McLimore is a member of the Independent Grocers Alliance. As a result he receives posters and advertising material from the central headquarters. He has the advantage of common purchasing power with a great number of other stores. His store front is similar to the store fronts of other individual merchants who operate a single store but are members of Independent Grocers Alliance. McLimore sells oleomargarine and cigarettes. As a result he pays a license tax to the state which is about $22.00. His tax on the sales which I estimate at $25,000.00 are at the rate of 1/20th of 1% and would amount to $12.50. Consequently, he would have no tax to pay because the Kentucky Gross Sales Statute allows him to deduct the special license taxes which he pays to the state. On the other hand, each of the Kroger Stores in the city of Owensboro, Kentucky, would have a tax of about $400.00. Each store would be taxed at the rate of 1% because the sales of each store would be aggregated with the sales of every other Kroger store in the state of Kentucky.

The Kroger Grocery and Baking Company operates a grocery in Madisonville, Kentucky. The principal competitors of this store are as follows:

W. H. Arnold whose annual sales I estimate at $25,000.00. [fol. 253] G. T. Beeney whose annual sales I estimate at $25,000.00.

George H. Fuchs, estimated annual sales $20,000.00.

I do not believe that there is any competing store in Madisonville, Kentucky, that is operated by an individual or a corporation who does not own or operate any other store that would have any tax to pay, because in each case the deductions permitted would completely offset the tax. On the other hand, the store operated by The Kroger Grocery & Baking Company would have a tax of about $400.00.

The Kroger Grocery & Baking Company operates two stores in the city of Henderson, Kentucky. These are located at 234 South Second Street and 102 N. Main Street. The principal competitors are:

Quinn Brothers whose annual sales I estimate at $35,000.00 are located on S. 2nd Street.

J. E. Blanford, Grocery, estimated annual sales $25,000.00.

Willie Weiner, South Second Street whose sales I estimate at $20,000.00.

Louis Keifer whose estimated annual sales are about $25,000.00.

White Front Grocery whose estimated annual sales are about $40,000.00. Four of these competing stores are owned and operated by persons who do not own or operate any other store in the state of Kentucky as far as I know. Each of these four, however, is or has been a member of Independent Grocers Alliance and as a result they receive the benefits derived from connection with that organization. The fifth is owned by an individual who does not operate any other store in the state of Kentucky as far as I know. The owner of this store is associated with Urma, a cooperative buying association, and as a result receives the benefit of quantity buying and mass merchandising. He receives the benefit of the cooperative advertising of the central Urma organization.

None of the stores in Henderson, Kentucky would, in my [fol. 254] opinion, have any taxes to pay because each of them would be able to set off the taxes that they now pay the state for special license taxes. However, the Kroger stores would be subjected to a 1% tax and each of them would have to pay $400.00.

The Kroger Grocery and Baking Company operates a store in Hopkinsville, Kentucky, over which I have supervision. Some of our competitors of this store in Hopkinsville, Kentucky, who do not own or operate any other stores in the state of Kentucky are, to the best of my knowledge, as follows:

Curtis and Company, W. 7th Street, whose annual sales I estimate to be about $65,000.00.

Cox and Wilson, whose annual sales I estimate to be $50,000.00.

J. T. Walker, 602 S. Main Street, estimated annual sales $55,000.00.

Heltsley Brothers, East 7th Streeet, estimated annual sales $30,000.00.

Clark Cliff, South Main, whose annual sales I estimate at $35,000.00.

I do not believe that any of the stores competing with The Kroger Grocery and Baking Company in this county that are owned by persons who do not own any other store would have any tax to pay under the Gross Sales Tax Law because of the setoffs which they are allowed.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the setoffs which they are [fol. 255] allowed to take.

It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who operate or own a single store could open new stores without subjecting themselves to the tax.

I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax However, the members of the cooperative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who cooperate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as I assist the Kroger managers.

Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger Stores as separate units but aggregate the sales of all its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the benfits received by voluntary association of independent store own-
[fol. 256] ers and permits those owners to operate without paying any tax.

D. T. Petty.

Sworn to before me this 14th day of January, 1931. Jessie Rohrscheib, Notary Public of Vanderburg County, Indiana. My com. ex. Nov. 20, 1931. (Seal of Notary Public, Indiana.)

[fol. 257]

EXHIBIT "A"

L-i-c-e-n-s-e

District #14

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County oleo	City meat	Egg dealer	City grocery	City oleo
693	Madisonville, Ky..... 234 Second St.	8.25	6.00	15.75	11.00	11.00	.....	2.00	.....	8.25
2075	Henderson, Ky..... 102 No. Main St.	10.00	6.00	10.00	11.00	11.00	25.00	....	20.00	....
4085	Henderson, Ky.....	10.00	6.00	.....	.....	11.00	25.00	2.00	20.00	....
5223	Hopkinsville, Ky.....	.....	6.00	.....	.....	11.00	.....	2.00	40.00	....
5234	116 So. Second St. Owensboro, Ky..... 312 Frederica St.	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....
5235	Owensboro, Ky.....	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....

[fol. 258] AFFIDAVIT OF ALBERT B. BERGER

STATE OF OHIO,
County of Hamilton, ss:

Albert B. Berger, being first duly sworn, deposes and says as follows:

My name is Albert B. Berger, I am 31 years of age, and I live with my family in Cincinnati, Ohio. I have been engaged in the grocery business for eighteen years, and during that time, I have been associated with Depenbrock Grocery located at 815 Monmouth Street, Newport, Kentucky, and with The Kroger Grocery & Baking Company. The owner of Depenbrock Grocery does not own or operate any other store in the State of Kentucky. This store is conducted in the same manner that the Kroger stores that I supervise. It sells the same kind of food to the same public. The only difference between Depenbrock and Kroger is that Depenbrock delivers and Kroger does not.

I was Assistant Manager for Depenbrock for about six years, and with the Kroger Grocery & Baking Company, I served as a clark in the store, store manager, supervisor, assistant Branch Manager, Branch Manager and Superintendent.

At present and for the last year, I have been Superintendent, having charge of 125 stores, 82 of which are situated in Kentucky. Most of these stores are in Covington, Newport, Ft. Thomas, Bellevue, and Dayton, Kentucky, and the counties surrounding these cities. As Superintendent of the stores, I usually visit them at least once every three weeks. I keep check of the stock carried in the store, I check the sales made, I advise the managers as to the problems of merchandising, and it is part of my duty to be acquainted with competitive conditions in regard to each store.

I am acquainted with the location of the store operated by each merchant competing with the various Kroger stores [fol. 259] under my supervision, and in a general way, I am acquainted with the stock carried by these competitors and the number of employees of each competitor. I am acquainted with the affiliations of these stores, and I can estimate the approximate gross annual sales of each of the stores competing with the Kroger stores under my supervision.

On Exhibit A, attached hereto, and made a part hereof, I have listed the Kroger stores under my supervision, together with the location of each store. In Columns 3 and 4, I have listed merchants competing with each of the stores under my supervision, who do not operate more than one store. In Column 5, I have listed the approximate annual sales of each competitor.

On Exhibit B, attached hereto and made a part hereof, I have listed the taxes which each of the stores under my supervision has to pay. The taxes paid by our competitors under the same circumstances are equal to the taxes of each Kroger store.

The average sales of each of the Kroger stores under my supervision is about Forty Thousand ($40,000) Dollars per year. In my opinion, some of the independent merchants competing directly with neighboring Kroger stores have gross annual sales which exceed the annual sales of the nearby Kroger store.

A grocery store competes with the merchant selling similar articles whose store is in the vicinity and the store, and the sales thereof, is not affected by the fact that another merchant operates a store or a group of stores in another part of the state. The Kroger stores under my supervision compete directly with the independent merchants listed on Exhibit A. In each case the Kroger stores and the competitors are selling similar articles, viz: groceries, to the same public. There is no monopoly in the grocery business in the district under my supervision and the field is highly competitive.

[fol. 260] The average sales of the independent competitors in the district under my supervision are about Thirty Thousand ($30,000) Dollars per year. Under the gross sales tax law of the State of Kentucky, the average merchant would have to pay one-twentieth of one per cent (1/20th of 1%), or Fifteen ($15) Dollars. Practically all grocers in this district sell Oleomargarine and pay the state license tax of Eleven ($11) Dollars. A majority of them sell cigarettes and pay an additional license fee of Eleven ($11) Dollars. These special license fees amounting to Twenty-two ($22) Dollars would completely offset the Fifteen ($15) Dollars tax required under the Gross Sales Tax law, and as a result the average merchant who oper-

ates only a single store would have no tax to pay. On the other hand, in the case of the Kroger stores, each would be subjected to a tax which would not be based on the sales in that particular store but which would be based on the aggregate sales of all the Kroger stores in the State of Kentucky, which I understand to be Twelve Million ($12,000,000) Dollars. As a result each store would be subjected to a One (1%) Per Cent tax, which would amount to about Four Hundred Sixty ($460) Dollars. The Kroger Grocery & Baking Company would be permitted to deduct the same license tax as the independent competitors, however, the tax levied on each of the Kroger stores would be so large that even after deduction, they would still have about $425.00 to pay on each store. As a result, the only competitors of The Kroger Grocery & Baking Company who would have a tax to pay would be those who operated a number of stores and whose aggregate sales in all of the stores was taken as a basis for the tax.

The profits from store operation in the district under my supervision which we endeavor to make, is about Two (2%) Per Cent on gross sales. Where we are able to make a profit of (2%) Per Cent on gross sales, a 1% tax would [fol. 261] take about half of this profit, and if we failed to make the Two (2%) Per Cent profit, the One (1%) Per Cent tax would turn our profit into a loss, or in the event we were losing on a particular store, it would increase our loss. The taxes, therefore, are oppressive and prohibitive. It is practically impossible to operate a store and pay a tax of Four Hundred Fifty ($450) Dollars. It would be impossible to increase business because all of the increased business would be subjected to a One (1%) Per Cent tax. It would be impossible to open new stores because the sales of the new stores would be added to the sales of the old stores and as a result, subjected to the One (1%) Per Cent tax. On the other hand, competitors who at present operate only a single store, could increase business or open new stores without subjecting themselves to any tax.

As a result of the One (1%) Per Cent levy on the Kroger stores and the failure to assess any tax against competitors operating single stores these competitors would have an unfair advantage.

Many of the merchants who operate a single store which are competing with the Kroger stores under my super-

vision, are now members of cooperative associations and as a result, they receive the benefits of mass buying, mass purchasing and group advertising. I am att-ching hereto and marking as Exhibit C, copies of advertising by A. C. S. stores and I. G. A. stores which are voluntary associations operating in my district.

Many of the competitors have joined the Cincinnati Wholesale Grocers Association which is also a voluntary cooperative society. I believe that if the members of the cooperative societies had their sales aggregated that they would be subjected to a One Per Cent (1%) tax the same as the Kroger stores. However, under the Kentucky Gross Sales Tax law, each of these stores is treated as a separate unit for the purpose of taxation. In the Kroger organization, each store is a separate unit and separate records are [fol. 262] kept for each store. Each store is charged with its rent, its purchases and credited with its sales. This separation, however, is disregarded by the Kentucky Gross Sales Tax law which requires the aggregation of the sales of all Kentucky stores.

Albert B. Berger.

Sworn to before me and subscribed in my presence this 28 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 263]

EXHIBIT "A"

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Newport	648 Monmouth St.	Raymond Lippert	621 Monmouth St.	75,000.00
	101 W. Fifth St.	Fred Hindmarch	Fourth & Columbia	50,000.00
	413 E. Third St.	J. W. Wetzel	3rd & Park	75,000.00
	109 E. Third St.	J. W. Wetzel	" "	75,000.00
	529 Overton St.	Reis Bros.	4th & Overton	50,000.00
	948 Monmouth St.	Hilbert Bros.	925 Monmouth	30,000.00
	945 Central Ave.	Krebs & Suter	9th & Central	40,000.00
	402 E. Tenth St.	C. J. Radley	11th & Central	30,000.00
	221 W. 11th St.	H. A. Weber	11th & Patterson	30,000.00
	719 Patterson St.	Phil. Haberbusch	7th & Patterson	35,000.00
	1118 Patterson St.	L. Burkart	11th & Patterson	20,000.00
	2 E. 11th St.	A. W. Stratman	33 E. 11th St.	35,000.00
	838 Monmouth St.	Hilbert Bros.	925 Monmouth St.	30,000.00
Dayton	639 Sixth St.	Berenden	929 Fourth St.	65,000.00
	206 Sixth St.	A. Day	137 6th St.	25,000.00
	301 Clay St.	Berendsen	929 Fourth St.	
	1101 Third St.	Niemeyer, 1031 5th St.	1031 5th St.	40,000.00
	503 Sixth Ave.	H. Miller	201 6th St.	25,000.00
Bellevue	201 Fairfield Ave.	Meifert's Groc.	Berry & Fairfield	25,000.00
	336 Taylor Ave.	N. Bihl	Center & Division	40,000.00
	366 Berry St.	N. Bihl	Center & Division	40,000.00
	600 Center St.	N. Bihl	Center & Division	40,000.00
	300 Walnut St.	N. Bihl	Center & Division	40,000.00
	501 Fairfield Ave.	L. Bischoff	705 Fairfield	25,000.00
Ft. Thomas	1041 S. Ft. Thomas	Highland Groc.	1051 S. Ft. Thomas	65,000.00
	913 N. Ft. Thomas	C. F. Nagel	901 N. Ft. Thomas	90,000.00
	44 N. Ft. Thomas	Geo. P. Stegner & Sons	30 N. Ft. Thomas	75,000.00
Clifton	68 Park Ave.	Mrs. Weber	Main & Park	20,000.00
Southgate	210 Evergreen	Schindler	Custis & Alexandria	20,000.00
Alexandria	Main St.	Hess & Roche	Main St.	15,000.00
Silver Grove	Lower Rive-Rd.	Glen Jolly	River & 4 Mile Rd.	35,000.00

[fol. 264]

Cynthiana	101 Pike St.	Rees & Rees	103 Pike Street	30,000.00
	Main & Pleasant	Riester	Main & Pleasant	20,000.00
Covington	101 Madison	C. A. Brandenburg	1048 Madison	20,000.00
	1316 Greenup	Saurber Grocery	1502 Greenup	25,000.00
	631 Madison Ave.	Geo. C. Goode	18 W. 7th St.	90,000.00
	521 E. 20th St.	N. Werning	600 Delmar	30,000.00
	2046 Madison	Kess Bros.	2001 Scott St.	50,000.00
	4001 De Coursey	John Gerwes	3935 De Coursey	30,000.00
	1601 Holman St.	H. H. Hoefker	1634 Holman	50,000.00
	3622 DeCoursey	Chas. Demmin	3606 DeCoursey	35,000.00
	1604 Greenup St.	John Schmitt	1731 Greenup	30,000.00
	1501 Maryland	J. J. Dailey	1557 Maryland	30,000.00
	1902 Garrard	Hais (Chas)	307 E. 19th St.	20,000.00
	331 W. 19th St.	Wm. Hempke	19th & Holman	60,000.00
	4 E. 31st St.	John Glenn	30th & DeCoursey	20,000.00
	1430 Russell St.	Ray Crouch	1431 Russell	20,000.00
	1700 Eastern Ave.	L. J. Schreck & Son	16th & Eastern	25,000.00
	2115 Howell St.	Mrs. E. Brue	1922 Howell	12,000.00
	643 Bakewell St.	John Riesenbeck	701 Bakewell	25,000.00
	401 Pike St.	Irvin Darnell	4th & Pike	35,000.00
	801 Greenup St.	Coyne Bros.	8th & Greenup	40,000.00
	1140 Holman St.	Martina Groc.	12th & Banklick	15,000.00
	601 Main St.	A. B. Dierckes	647 Main St.	40,000.00
	1253 Highway Ave.	Hampton	Altamont & Alberta	25,000.00
	101 W. Sixth St.	Sommers	606 Washington	15,000.00
	226 W. Third St.	G. B. Remley	320 Johnson	30,000.00
	1104 Greenup St.	Gaupohl	11th & Greenup	25,000.00
	268 Pike St.	Frank Hartman	269 Pike St.	35,000.00
	318 Greenup St.	J. Horowitz	317 Greenup	25,000.00
	664 Pike St.	Phil. Mildenberg	712 Pike St.	40,000.00
	393 Madison Ave.	E. Dungan	402 Russell	40,000.00
	725 Madison Ave.	Meyers & Hiltz	703 Madison	45,000.00
	3327 Latonia Ave.	W. G. Perry	33 & Latonia	30,000.00
	4456 DeCoursey	John Gerwes	3935 DeCoursey	35,000.00
	337 W. Southern	G. W. Ellison	Grace & Southern	35,000.00

[fol. 265]

EXHIBIT "A"—Continued

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Ludlow	306 Elm St.	J. A. Lahman	327 Elm	50,000.00
	815 Oak St.	J. Etler	821 Oak St.	35,000.00
	460 Oak St.	Walz Bros.	Helen & Oaks Sts.	35,000.00
Erlanger	30 Lexington Pk.	Jos. Herrmann	29 Lexington Pk.	25,000.00
		Kenney	Erlanger	30,000.00
Bromley	4 Shelby Ave.	Eubanks	Main & Shelby	22,000.00
Florence	Dixie Highway	M. G. Martin	Florence	25,000.00
Ft. Mitchell	Dixie Highway	Kenney	Ft. Mitchell	25,000.00
Elsmere	499 Dixie Hgway	(No. Ind. competitor)		
Augusta	202 Upper St.	R. P. Yates	31 Upper St.	18,000.00
		Mains	235 Upper St.	18,000.00
Maysville	1206 W. Second St.	M. C. Hutchins	1201 W. 2nd	30,000.00
	111 W. 2nd St.	Chas. Conrad	1115 W. 2nd St.	25,000.00
	200 Market St.	Coblitz & Snapp	235 Market	30,000.00
Williamstown	Paris St.	A. N. Skinner	120 S. Main	22,000.00
Carlisle	112 S. Main St.	Sexton	108 S. Main	30,000.00
Walton	22 N. Main St.	F. B. Hammond	Walton	25,000.00
Flemingsburg	121 E. Water St.	Doherty	115 E. Water	25,000.00
Falmouth	124 Shelby St.	G. W. Colvin	Shelby St.	25,000.00

[fol. 266]

EXHIBIT "B"

Taxes and Licenses Paid for Stores in the State of Kentucky
of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
Newport	648 Monmouth St.		6.00	None	11.00	11.00	15.00	30.00	None	15.02	11.96
	101 W. Fifth St.		"	"	"	"	"	"	"	"	"
	413 E. Third St.		"	"	"	"	"	"	"	"	"
	109 E. Third St.		"	"	"	"	"	"	"	"	"
	529 Overton St.		"	"	"	"	"	"	"	"	"
	948 Monmouth St.		"	"	"	"	"	"	"	"	"
	945 Central Ave.		"	"	"	"	"	"	"	"	"
	402 Tenth St.		"	"	"	"	"	"	"	None	None
	221 W. Eleventh St.		"	"	"	"	"	"	"	15.02	11.96
	719 Patterson St.		"	"	"	"	"	"	"	"	"
	1118 Patterson St.		"	"	"	"	"	"	"	"	"
	2 E. Eleventh St.	No Tax Unless Served	"	"	"	"	"	"	"	"	"
	838 Monmouth St.		"	"	"	"	"	"	"	"	"
Dayton	639 Sixth St.	5.00	6.00	5.00	11.00	11.00	15.00	15.00	None	47.31	11.96
	206 Sixth St.	"	"	"	"	"	"	"	"	"	"
	301 Clay St.	"	"	"	"	"	"	"	"	"	"
	1101 Third St.	"	"	"	"	"	"	"	"	"	"
	503 Sixth Ave.	"	"	"	"	"	"	"	"	"	"
Bellevue	201 Fairfield Ave.	None	6.00	10.00	11.00	11.00	10.00	None	None	38.06	11.96
	356 Taylor Ave.	"	"	"	"	"	"	"	"	"	"
	366 Berry St.	"	"	"	"	"	"	"	"	"	"
	600 Center St.	"	"	"	"	"	"	"	"	"	"
	300 Walnut St.	"	"	"	"	"	"	"	"	"	"
	501 Fairfield	"	"	"	"	"	"	"	"	"	"
Ft. Thomas	1041 S. Ft. Thomas	10.00	6.00	None	11.00	11.00	None	None	None	53.33	11.96
	913 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"
	44 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"

12—30

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EXHIBIT "B"—Continued

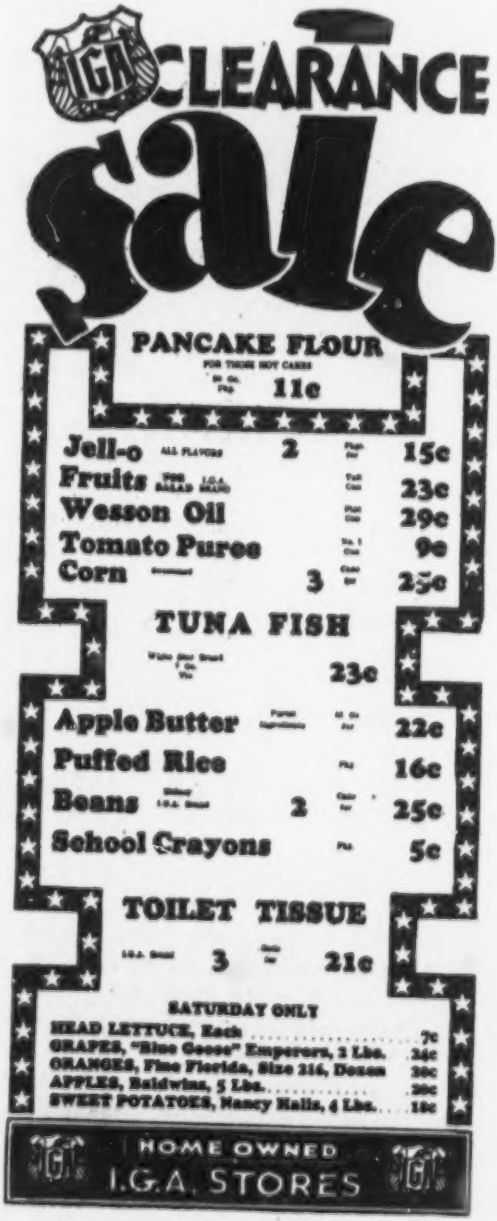
Taxes and Licenses Paid for Stores in the State of Kentucky of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
Clifton	68 Park Ave.	5.00	6.00	None	11.00	11.00	10.00	5.00	None	32.51	11.96
Southgate	210 Evergreen Ave.	None	6.00	None	"	"	5.00	5.00	None	22.61	11.96
Alexandria	Main St.	None	6.00	None	11.00	11.00	50.00	None	.....	7.50	11.96
Silver Grove	Lower River Rd.	None	6.00	None	11.00	11.00	None	None	None	None	11.96
Cynthiana	101 Pike St.	25.00	6.00	10.00	11.00	11.00	None	None	2.00	57.00	25.79
[fol. 267]											
	Main & Pleasant	"	"	"	"	"	"	"	"	"	"
Covington	1101 Madison	10.00	6.00	None	11.00	11.00	10.00	None	None	28.19	12.49
	1316 Greenup St.	"	"	"	"	"	"	"	"	"	"
	631 Madison Ave.	"	"	"	"	"	50.00	"	"	"	"
	521 E. 20th St.	"	"	"	"	"	"	"	"	"	"
	2046 Madison	"	"	"	"	"	"	"	"	"	"
	4001 De Coursey	"	"	"	"	"	"	"	"	"	"
	1601 Holman St.	"	"	"	"	"	"	"	"	"	"
	3622 DeCoursey	"	"	"	"	"	10.00	"	"	"	"
	1604 Greenup	"	"	"	"	"	"	"	"	"	"
	1501 Maryland	"	"	"	"	"	"	"	"	"	"
	1902 Garrard	"	"	"	"	"	50.00	"	"	"	"
	331 W. 19th St.	"	"	"	"	"	"	"	"	None	None
	4 E. 31st St.	"	"	"	"	"	"	"	"	28.19	12.49
	1430 Russell St.	"	"	"	"	"	10.00	"	"	"	"
	1700 Eastern Ave.	"	"	"	"	"	50.00	"	"	"	"
	2115 Howell St.	"	"	"	"	"	10.00	"	"	"	"
	643 Bakewell St.	"	"	"	"	"	"	"	"	"	"
	411 Pike St.	"	"	"	"	"	50.00	"	"	"	"
	801 Greenup St.	"	"	"	"	"	10.00	"	"	"	"
	1140 Holman St.	"	"	"	"	"	"	"	"	"	"
	601 Main St.	"	"	"	"	"	50.00	"	"	"	"

	1253 Highway Ave....	"	"	"	"	"	"	"	"	"	"
	101 W. Sixth St.....	"	"	"	"	"	"	"	"	"	"
	226 W. Third St.....	"	"	"	"	"	10.00	"	"	"	"
	1104 Greenup St.....	"	"	"	"	"	"	"	"	None	None
	268 Pike St.....	"	"	"	"	"	"	"	"	28.19	12.49
	318 Greenup St.....	"	"	"	"	"	"	"	"	"	"
	664 Pike St.....	"	"	"	"	"	50.00	"	"	"	"
	393 Madison Ave.....	"	"	"	"	"	10.00	"	"	None	None
	725 Madison Ave.....	10.00	6.00	None	11.00	11.00	10.00	None	None	None	None
	3327 Latonia Ave.....	"	"	"	"	"	"	"	"	28.19	12.49
	4456 DeCoursey.....	"	"	"	"	"	"	"	"	"	"
[fol. 268]	337 W. Southern.....	"	"	"	"	"	50.00	"	"	"	"
Ludlow.....	306 Elm St.....	None	6.00	None	11.00	11.00	15.00	None	None	25.96	12.49
	815 Oak St.....	"	"	"	"	"	"	"	"	"	"
	460 Oak St.....	"	"	"	"	"	"	"	"	"	"
Erlanger.....	30 Lexington Pk.....	"	6.00	None	11.00	11.00	None	None	None	21.77	12.49
Bromley.....	4 Shelby Ave.....	"	"	"	"	"	"	"	"	"	"
Florence.....	Dixie Highway.....	10.00	"	"	"	"	"	"	2.00	14.66	18.88
Ft. Mitchell....	Dixie Highway.....	None	"	"	"	"	"	"	"	None	12.49
Elsmere.....	409 Dixie Highway...	"	"	"	"	"	"	"	"	12.00	12.49
Augusta.....	202 Upper St.....	15.50	"	"	"	"	"	"	"	37.82	37.87
Maysville.....	1206 W. Second St....	5.00	"	20.00	"	"	15.00	"	"	21.61	16.88*
	111 W. Second St.....	"	"	"	"	"	"	"	"	"	"
	220 Market St.....	"	"	"	"	"	"	"	"	"	"
Williamstown..	Paris St.....	None	"	26.00	"	"	None	"	"	30.60	20.71
Carlisle.....	112 S. Main St.....	10.25	"	20.25	"	"	"	"	"	17.48	11.61
Walton.....	22 N. Main St.....	None	"	None	"	"	"	"	"	28.13	18.87
Flemingsburg..	121 E. Water St.....	10.25	"	"	"	"	"	"	"	11.92	15.14
Falmouth.....	124 Shelby St.....	15.00	"	15.00	"	"	10.00	5.00	"	41.10	29.93
Total.....		516.00	498.00	226.25	913.00	913.00	1425.00	480.00	28.00	2181.57	1063.67

* Bakery Agency $20.00.

[fol. 269] EXHIBIT "C"



[fol. 270] AFFIDAVIT OF JOHN E. DONAHUE

STATE OF KENTUCKY,
County of Jefferson, ss:

John E. Donahue, being first duly sworn, deposes and says as follows:

I am thirty years old and live with my family in Lexington, Kentucky. I have been in the grocery business for the last nine years; operated meat market for about two years and have been a clerk and manager of a store, stock auditor, assistant superintendent and superintendent for the Great Alantic & Pacific Tea Co. For the last two years I acted as superintendent for that Company.

As superintendent I have charge of forty-nine stores in the Eastern part of Kentucky and in the Bluegrass district, which includes the cities of Lexington, Danville, Frankfort and the surrounding territory.

As supervisor of these stores it is my duty to visit them frequently, check up on stock carried, keep tab of the sales which they make and advise the managers in regard to merchandising problems. It is part of my duties to keep the Company informed of the possibility of expansion in any particular territory and it is also part of my duties to be acquainted with the general competitive conditions of the grocery business in the territory under my supervision.

By reason of my duties and because of my acquaintance with the various locations occupied by competitive stores and because of my familiarity with the number of employees and general conditions, I am familiar with the retailing of groceries in the territory under my supervision. I am familiar with the affiliation of competitive stores and with the character of merchandise sold therein. I am acquainted with the tax which the various stores must pay and I am able to estimate the approximate gross sales of the various [fol. 271] stores located in the district.

Exhibit "A" attached hereto and made a part hereof lists in Columns 1 and 2 the Atlantic & Pacific stores under my supervision. I have also listed the individuals and corporations who operate a single store opposite the name of the Atlantic & Pacific store with which that particular individual or corporation competes. Estimated gross sales of these individuals or corporations are listed in Column 5.

The average gross sales of each Atlantic & Pacific store in my territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under my supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductable, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay because their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell Oleomargarine, cigarettes and candled eggs. The tax on the independent store would by 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomargine license would completely offset this tax. The Great Atlantic & Pacific Tea Co., has sales approximating Thirteen Million ($13,000,000) Dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) [fol. 272] Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which members of the Atlantic & Pacific organization have—have no tax to pay.

The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quan-

tity buying and supervision by a trained expert; however, the owner of this store sells Oleomargarine and Cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales.

Exhibit "B" attached hereto and made a part hereof, lists the stores under my supervision and the tax which each store is to pay. The tax would be the same for each of the competitors of the Atlantic & Pacific Stores which I supervise and the result is the same as shown in the two examples which I have listed. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under my supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to [fol. 273] operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell us without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which I supervise are held under long term leases and the closing of the same would involve heavy losses.

The Independent Grocers Alliance is very active in the district over which I have supervision. This organization gives its members following service: Window posters and instructions in regard to window display. Each member of the association has prominent store fronts and no one member is distinguishable from any other. The central organization sends supervisors to the retailer who advises them in regard to the merchandising of goods, the installa-

tion of stock and advertising in much the same way as I advise the managers of the stores under my supervision.

In the City of Lexington the Independent Grocers Alliance has common advertising for all of its members. Exhibit "C" is a copy of the newspaper advertising of the United Grocers Alliance in the City of Lexington, Ky.

I am informed and believe that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) per cent on sales; that is, if they were taxed in the same manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the cooperative association, although enjoying all the benefits enjoyed by the Atlantic & Pacific stores under my supervision, pay no tax at all.

[fol. 274] I am attaching hereto and marking as Exhibit "D," a picture of our store and the store operated by the M. & C. Cash Grocery, 118 Main Street, Georgetown, Kentucky. These two stores are adjoining. The M. & C. Cash Grocery is a member of the I. G. A. It has a front which is common to all I. G. A. stores, just as the neighboring store which we operate has a front which is common to all stores that we operate. The I. G. A. store sells for cash and makes no deliveries. Its groceries are the same type as handled in our store. Its arrangement is practically the same as ours. Its sales are about as large as the sales in our store. However, its special license taxes would relieve it from the payment of any tax, on the other hand, our store would be subjected to a Five Hundred ($500) Dollar burden under the Gross Sales Tax Law of Kentucky. This situation is an example of the condition that prevails in many neighborhoods. Groceries which are in the immediate vicinity of the Atlantic & Pacific Store which we operate, have no taxes to pay, while our stores have a heavy burden to meet, altho these stores are direct competitors.

I am attaching hereto and marking as Exhibits "E," "F" and "G," wrappers taken from articles purchased at this I. G. A. store in Georgetown. Similar products are sold under the same kind of wrappings in all I. G. A. stores.

Each store in the Atlantic & Pacific system is a separate unit, separate books are kept, and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the

goods it sells. The aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax statute disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Groceries Alliance.

John E. Donahue.

Subscribed and sworn to before me this 4th day of February, 1931. Nadine McCreary, Notary Public, Jefferson County, Ky. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.) Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931.

[fol. 275]

EXHIBIT "A"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

SUP'T. JOHN E. DONAHUE'S TERRITORY

PRINCIPAL INDEPENDENT COMPETITORS

CITY	ADDRESS	FIRM NAME	ADDRESS	ESTIMATED ANNUAL SALES
Barbourville	Main & Pub. Sq.	Bennington Bros.	Barbourville	$50,000
Corbin	222 Center	Pennington & Gabbert	Corbin	35,000
Corbin	715 Main	None	None	———
Cumberland	Main St.	I.O.A.	Cumberland	45,000
Danville	229 W. Main St.	Jones Bros.	Danville,	68,000
Evarts	Tocum St.	I.O.A.	Evarts	41,600
Frankfort	111 Bridge St.	Wooman Brothers	Frankfort	52,000
Frankfort	313 St. Clair	Home Owned	Do	31,200
Frankfort	601 High St.	W. Markhall	Do	47,000
Georgetown	118 Main St.	M.& C. Cash Gro.	Georgetown	31,200
Harlan	103 S. Main St.	W. H. Pennington	Harlan	75,000
Harlan	Tanner Bld.Main St.	Smith Groc.	Do	50,000
Harrodsburg	516 Main St.	A. Patterson	Harrodsburg	62,400
Hazard	216 Main St.	Service Gro. Co.	Hazard	40,000
Hazard	113 Main St. E/S	Parkins Gro.	Do	50,000
Irvine	209 Main St.	F.M. Welch	Irvine	55,000
Jackson	Main Nr. Bdwy	Daniels Market	Jackson	45,000
Lancaster	126 Main St.	M. H. Forbes	Lancaster	31,200
Lawrenceburg	133 S. Main St.	Turner & Brown	Lawrenceburg	31,200
Lexington	185 E. Limestone	Alex Hughes	Lexington	52,000
Lexington	401 S. Broadway	Kelly Hunt	Do	52,000
Lexington	125 N. Broadway	Packing House Mkt.	Do	108,000
Lexington	496 E. High St.	J. L. Rue & Son	Do	41,600
Lexington	Elm Tree Lane	None	None	———
Lexington	933 S. Limestone	None	None	———
Lexington	133 Third St.	None	None	———
Lexington	801 S. Bdwy	Coldglaser & Hafely	Lexington	41,600
Lexington	404 Georgetown	B.N. Foley	Lexington	25,000
Lexington	646 E. Main St.	Rue Grocery	Lexington	78,000
Lexington	568 W. Main St.	Thurston Market	Lexington	62,400
Lexington	432 E. 3rd St.	Powell Gro.	Lexington	31,200
Lexington	1203 Limestone	Yeager's Gro.	Do	23,400
Middlesboro	2026 Cumb St.	S. Cowley & Son	Middlesboro	125,000
Mt. Sterling	42 Main St.	C. Childres	Mt. Sterling	50,000
Neon	Main St.	Chas. Taylor	Neon	75,000
Nicholasville	113 S. Main St.	T. C. Willis	Nicholasville	55,000
Paris	629 Main St.	Chas. Cook	Paris	62,400
Pineville	Pine St.	Cabliff Cash Store	Pineville	60,000
Ravenna	706 Main St.	J. M. Hamilton	Ravenna	45,000
Richmond	112 E. Main St.	O. Ringo	Richmond	40,000
Somerset	107 Mt. Vernon	I.G.A.	Somerset	46,800
Stanford	Main St.	D. Campbell	Stanford	51,000
Versailles	138 Main St.	Howard Bros.	Versailles	36,400
Vicco	Main St.	Dan Watts	Vicco	65,000
Wallins Creek	Howard St.	I.G.A.	Wallins	30,000
Whitesburg	Main & Court	I.C. Hichey	Whitesburg	45,000
Williamsburg	400 Main St.	Pennington & Gabbert	Williamsburg	62,400
Winchester	20 E. Main St.	Here Groc.	Winchester	80,000

[fol. 276]

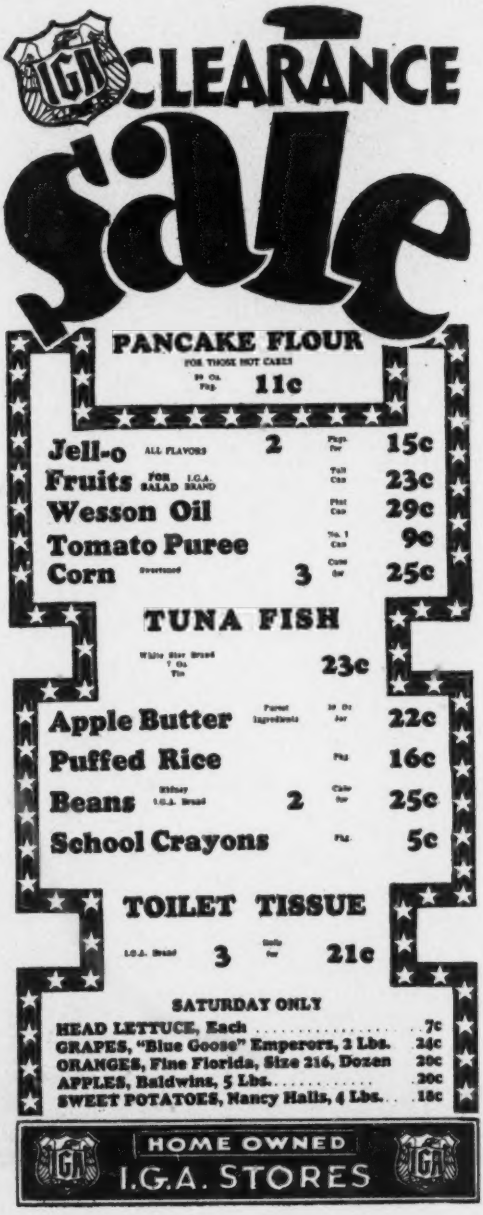
EXHIBIT "B"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

SUP'T. JOHN E. DONAHUE'S TERRITORY

City	Street Address	Soft Drinks	Oleo	State and County	Cigarettes	City Grocery	City Meat	Egg Dealers	City and School	Miscellaneous	Total
Barbourville	Main & Pub.Sq.	6.00	11.00	26.00	11.00	-	-	2.00	25.00		81
Corbin	222 Center	11.00	11.00	22.00	18.00	10.00	-	2.00	26.00		100
Corbin	213 Main	11.00	11.00	42.00	18.00	10.00	-	2.00	26.00		120
Cumberland	Main St.	6.00	11.00	65.00	22.00	26.00	-	-	15.00		145
Danville	229 W. Main	31.00	11.00	14.00	21.00	25.00	-	2.00	35.00		139
Everts	Tocum St.	12.00	11.00	46.00	17.00	10.00	21.00	-	50.00	5.00 C. Pond	172
Frankfort	111 Bridge	11.00	11.00	21.00	21.00	20.00	25.00	2.00	27.00		138
Frankfort	313 St.Clair	.00	11.00	37.00	21.00	20.00	25.00	2.00	27.00		144
Frankfort	601 High	.00	11.00	23.00	21.00	20.00	35.00	2.00	41.00		154
Georgetown	118 Main St.	6.00	11.00	16.00	26.00	90.00	15.00	2.00	66.00		192
Harlan	103 S. Main	17.00	11.00	72.00	22.00	21.00	6.00	2.00	85.00		236
Harlan	Tom Bl, Main	17.00	11.00	63.00	22.00	21.00	6.00	-	61.00		201
Harrodsburg	516 Main St.	6.00	11.00	37.00	16.00	-	-	2.00	38.00		110
Hazard	216 Main St.	6.00	11.00	41.00	12.00	80.00	-	2.00	145.00		298
Hazard	113 Main, E/S	18.00	22.00	23.00	11.00	61.00	-	-	115.00		304
Irvine	209 Main	11.00	11.00	42.00	21.00	10.00	10.00	2.00	49.00		156
Jackson	Main nr Bway	16.00	11.00	73.00	21.00	25.00	-	2.00	56.00		204
Lancaster	126 Main St.	11.00	11.00	26.00	26.00	-	-	2.00	21.00		97
Lawrenceburg	133 S. Main	26.00	11.00	22.00	11.00	10.00	5.00	2.00	29.00		116
Lexington	185 N. Limestone	6.00	11.00	19.00	46.00	30.00	-	-	41.00		353
Lexington	401 S. Bway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	125 N. Bway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	496 E. High	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	Elm Tree Lane	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	933 Limestone	6.00	11.00	20.00	46.00	20.00	-	-	-		103
Lexington	133 - 3rdSt.	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	801 S. Bway.	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	484 Georgetown	6.00	11.00	14.00	46.00	20.00	-	-	41.00		138
Lexington	846 E. Main St	6.00	11.00	10.00	11.00	20.00	-	-	-		58
Lexington	588 W. Main	6.00	11.00	14.00	46.00	30.00	-	-	41.00		148
Lexington	432 E. 3rd St	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	1203 Limestone	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Middlesboro	2028 Cumb.	16.00	11.00	67.00	26.00	25.00	15.00	2.00	65.00		227
Mt. Sterling	42 Main St.	-	11.00	55.00	37.00	-	-	2.00	41.00		146
Neon	Main St.	6.00	11.00	15.00	11.00	21.00	-	-	39.00		103
Nicholasville	113 S. Main	6.00	11.00	31.00	36.00	-	35.00	2.00	50.00	5.00 Fish	176
Paris	629 Main St.	6.00	11.00	57.00	18.00	10.00	10.00	2.00	61.00		175
Pineville	Pine St	6.00	11.00	52.00	22.00	20.00	7.00	2.00	68.00		208
Ravenna	706 Main St.	11.00	11.00	66.00	21.00	20.00	-	2.00	64.00		195
Richmond	112 E. Main	16.00	11.00	40.00	26.00	10.00	15.00	2.00	66.00		186
Somerset	107 Mt.Vernon	21.00	11.00	25.00	26.00	30.00	-	2.00	46.00		161
Stamford	Main St.	6.00	11.00	34.00	11.00	-	-	2.00	43.00		107
Versailles	138 Main St.	31.00	11.00	9.00	11.00	-	25.00	2.00	22.00		111
Vicco	Main St.	6.00	11.00	33.00	11.00	52.00	-	-	25.00		138
Walling Creek	Howard St.	16.00	11.00	67.00	22.00	25.00	-	-	47.00		188
Whitesburg	Main & Court	6.00	11.00	82.00	11.00	15.00	-	-	70.00		195
Williamsburg	400 Main St.	6.00	11.00	48.00	11.00	5.00	-	2.00	38.00		121
Winchester	20 N. Main	6.00	11.00	60.00	62.00	-	-	2.00	35.00		176

[fols. 277 & 278] EXHIBIT "C"



[fol. 279]

EXHIBIT "D"

[fol. 280] EXHIBIT "E"

[fol. 281]

EXHIBIT "F"

[fol. 282]

EXHIBIT "G"

9 XII OZS. NET WEIGHT
IGA
GRADE A
CLEANED
CURRANTS
Coffee Cake
One cup bread dough, 2 tablespoons soft butter, 1 egg, 1 tablespoon sugar, ½ cup I.G.A. currants.
Beat this and make into soft loaf, let raise and roll 1 inch thick, raise again and bake, take from oven and spread the top with 1 tablespoon of sweet milk and two of pulverized sugar.
Sold Only At I.G.A. Stores
9 XII OZS. NET WEIGHT
IGA
GRADE A
CLEANED
CURRANTS
I.G.A.
Food Products
—for real economy
The greater value in I.G.A. Food Products is due to the nation-wide I.G.A. buying power which brings you better quality for less money.
Currant Bread
One quart bread dough taken from first raising of bread sponge, 1 tablespoon lard, 1 tablespoon butter, ½ cup sugar. Raise as light as stiff as for white bread. One cup I.G.A. currants, worked in while kneading. Let this raise twice, then make in loaf and bake one hour.

[fol. 283] AFFIDAVIT OF JOHN SCANLAN

STATE OF KENTUCKY,
County of Jefferson, ss:

John Scanlan, being first duly sworn deposes and says as follows:

I am forty years old and live with my family in Louisville, Kentucky, and for the last four years I have been in the meat business. I am associated with The Great Atlantic & Pacific Tea Company in the capacity of Meat Superintendent. I have charge of fifty-three meat markets of which forty are located in the State of Kentucky.

The meat markets operated by The Great Atlantic & Pacific Tea Company are housed in the same quarters as the grocery department; however, the meat department is entirely distinct from the grocery department. The supervisor of the grocery department has nothing to do with the men selling meats or of the purchase or distribution of the meat.

The A. & P. stores which operate meat markets in the State of Kentucky are listed in Exhibit "A". The firm name, address and estimated sales of competitors who operate only one store are listed on the same sheet.

Under the Gross Sales Tax, the meat sales would be added to the grocery sales in order to determine the total sales subject to the tax. The A. & P. meat markets compete with stores which do nothing but sell meat; these stores are taxed on their meat sales alone. It is incorrect, therefore, to add in the sales of groceries in the case of A. & P. when this is not done in the case of competitors. Because of this and because of the fact that all of the sales of A. & P. in the State of Kentucky are aggregated for the purpose of determining the tax, each of the A. & P. meat markets under my supervision would have to pay a tax which would be about one per cent on its gross sales. Each competitor would only have to pay about one-twentieth of one per cent and this one-twentieth would be completely deductible because of license taxes paid to the State.

As a result of the years I have spent in the grocery and meat business, and because of my familiarity with the [fol. 284] location and number of employees of my competitors, I can estimate the gross sales and none of them have sufficient sales to place them in the higher brackets.

The margin of profit in meat which A. & P. receives from each dollar of sale is very low—we have a large turnover, but the profit per dollar of sale does not exceed, at the most, one per cent. If the one per cent tax was imposed under the Gross Sales Tax Law, the amount which A. & P. would have to pay would exceed the profits it would make from the sale of meats. This would mean that A. & P. would have to go out of the meat business; it would have to abandon stores to which it has leases for the sale of meat and it would involve heavy losses to the company.

John Scanlan.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 285]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't John Scanlan's Territory

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Central City	109 Broad Street	NONE		
Evarts	Yocum St	NONE		
Frankfort	313 St. Clair	Fensel Bros	Frankfort	60,000
Georgetown	118 Main St	NONE		
Harlan	103 S. Main St	NONE		
Harlan	Tamer Bl. Main St	NONE		
Hazard	216 Main St	NONE		
Hazard	113 Main, E/S	NONE		
Hopkinsville	123 Ninth St	NONE		
Lebanon	119 Main St	NONE		
Lexington	401 S. Bdway	Lee Bromley	Upper & Maxw. Lex	20,000
"	496 E. High	LaRue & Son	Wdlawn & Euclid, Lex	35,000
"	933 S. Limestone	L. B. Heathman	Virgn. & Ninth, Lex	15,000
"	133 Third St	NONE		
"	646 E. Main	L. F. Rue	Clay & Main, Lexington	55,000
Louisville	1800 Frankfort Ave	Schoeffie M. Mkt	1810 Frankfort	26,000
"	1902 S. Third St	H. G. Brooks	1800 S. 3rd	78,000
"	3030 S. Fourth	South Lou. M. M.	4th & Central	20,800
"	1215 S. 28th St	Bloemers M. Mkt	1302 28th St	18,150
"	2533 Portland	Schiffer M. Mkt	2618 Portland	15,600
"	4130 W. Broadway	NONE		
"	1237 S. Shelby	Shelby Meat Mkt	1234 S. Shelby St	10,400
"	801 E. Broadway	NONE		
"	844 E. Market	F. Hegan	901 E. Market	26,000

"	Bdstn. & Dundee	Kurz M. Mkt	Dundee Road	36,400
"	501 N. 17th St	NONE		
"	852 S. 3rd St	NONE		
"	4518 Park Blvd	NONE		
"	306 W. Jefferson	NONE		
"	1501 Story Ave	NONE		
"	314 Woodlawn	Keller Market	310 Woodlawn	20,800
"	1501 S. 18th St	NONE		
"	3471 Taylor Blvd	W. Betz	3467 Taylor Blvd	20,800
"	3401 W. Market	J. Gold	3406 W. Market	15,600
"	2632 S. 4th St	NONE		
"	2046 S. Preston	NONE		
"	1614 Bdstn. Rd	A. Katzman	Bonnycastle Ave	18,200
"	605 W. Oak St	NONE		
St. Matthews		Roby & Clemens	St. Matthews	25,000
Louisville	4301 W. Market	NONE		
"	201 N. 26th St	T. McShane	2501 Rowan	7,800
Shively	18th St. Road	NONE		
Madisonville	132 S. Main	NONE		
Middlesboro	2028 Cumberland	NONE		
Mt. Sterling	#2 Main St.	White House M. M	Mt. Sterling	30,000
Neon	Main St	NONE		
Owensboro	120 E. 2nd St	NONE		
Paris	629 Main St	W. P. Phillips	Paris	40,000
Pineville	Pine St.	NONE		
Ravenna	706 Main St	J. Hackworth	Ravenna	15,000
Richmond	112 E. Main	J. M. Culton	Richmond	40,000
Whitesburg	Main & Court	NONE		
Winchester	20 N. Main St	B. Martin	Winchester	40,000

[fol. 286] AFFIDAVIT OF CHRIS SCHUMANN

STATE OF KENTUCKY,
County of Jefferson, ss:

Chris Schumann, being first duly sworn says as follows:

I am forty years old and live with by family in Louisville, Kentucky. I have been engaged in the grocery business fifteen years; I started with The Quaker Maid Company at the age of twenty-four years in the capacity as manager of an individual store for four years, and six years as supervisor with The Quaker Maid, becoming affiliated with the A. & P. Company, as assistant superintendent for three years and superintendent for three years.

As superintendent of the A. & P., I have charge of sixty-two stores in the western section of Louisville and towns surrounding Louisville. As superintendent of these sixty-two stores, I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P. from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competition for these stores is offered by the groceries which are within one block [fol. 287] or on the opposite corner. Every one of the stores under my supervision is in direct competition with other stores which are carrying on the same kind of business as

that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which I supervise that are doing more than $100,000.00 worth of business a year.

The stores which I supervise are listed in Exhibit "A" attached hereto in columns one and two. The principal competitors of each of these stores which are owned by either an individual or a corporation which owns only one store, are listed in column three and the estimated sales of each of the competing stores is listed in column five.

Almost every grocery store in my district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. On Exhibit "B", I have listed the taxes which each of the stores that I supervise has to pay. Competitors of the stores under my control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same taxes. For example, in the city of Campbellsville, I supervise a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to pay are deductible from the tax he [fol. 288] has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores.

The same result would occur in the case of every A. & P. store under my supervision, i. e., each store would be subject to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at #4 Kings Block; this store is under my direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and eggs. The total special license tax which the store I supervise has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which I supervise; the business conducted by it is exactly the same as the business conducted in the A. & P. store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which I supervise and not on the competitor of that store.

In Louisville, I supervise the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd & Portland Avenue. Mr. Fischer has no other store and the store operated by him is one of the chief competitors of the one which I supervise. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which I have listed above are fair examples of the situation in regard to each one of the sixty-two stores which I supervise. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which I supervise. In some cases the competing stores have a larger volume of sales than the stores under my control, but, in each case, the com- [fol. 289] peting stores are owned by either a corporation or an individual that owns no other stores, and pays no tax, whereas each and every one under my supervision pays a large tax under the Gross Sales Statute. This is caused by the fact that the sales in every one of the A. & P. stores are added together in order to put A. & P. into higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute

would be those who operate enough stores so as to make their aggregate sales over $400,000.00.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under my supervision. Such a tax would force the company to close almost all, if not all, its stores which I control; at least, I am practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in my territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which I supervise were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which I supervise to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for our competitors to undersell us, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of 1%, which Hawkins could do because of the heavy tax imposed on A. & P., he would be able to get the entire A. & P. business in Elizabethtown; he would then have [fol. 290] sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store we operate has one or more nearby competitors who would be glad to secure the business done by our stores. The stores which I supervise attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many of our competitors have copied our attempt to supply the customer on the basis of

a small margin of profit although they own only one store. Many of the competitors of the stores which I supervise are members of coperative buying associations. These organizations purchase goods for all members of the cooperative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as I supervise the stores under my control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, under the Kentucky Sales Tax Law, the members of the cooperatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in my stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

Subscribed and sworn to before me this 5th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 291]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Principal independent competitors: Firm name	Principal independent competitors: Address	Estimated annual sales
Bardstown	Main Street	Stoker & Smith	Bardstown	60,000
Campbellsville	112 Main St	Hoskins Groc	Campbellsville	52,000
Carrollton	424 Main St	G. G. Woods	Carrollton	75,000
Elizabethtown	Irwin Block	Hawkins Groc	Elizabethtown	40,000
Eminence	#4 Kings Block	Friend & Berry	Eminence	50,000
LaGrange	121 Main St	W. T. Barr	LaGrange	35,000
Lebanon	119 Main St	B. & B. Service Store	Lebanon	78,000
Louisville	1215 S. 28th	Bloeman Grocery	28th & Dumesnil	52,000
"	2533 Portland	Fisher Bros	25th & High	52,000
"	1255 S. 18th	Kallbrier Groc	18th & Dumesnil	78,000
"	633 S. 26th	Dillman	26th & Magazine	36,400
"	2500 W. Market	Holman	24th & Jefferson	52,000
"	4130 W. Bdway	C. Durbin	41st & Chestnut	65,000
"	2100 W. Walnut	Charley's Market	22nd & Walnut	50,000
"	501 N. 17th St	Goffman	18th & Bank	52,000
"	3729 W. Broadway	A. Armig	38th & Chestnut	41,600
"	1801 W. Market	Wineberg	18th & Market	36,400
"	3133 Portland	Fischer	33rd & Portland	31,200
"	2146 Duncan	Fred Davis	22nd & Duncan	30,000
"	2239 W. Oak	Allen & Moore	22nd & Oak	62,500
"	2301 W. Broadway	Yutz Grocery	22nd & Maple	35,000
"	1501 S. 18th	Faust Groc	18th & Bolling	42,000
"	358 N. 26th St	Morris	20th & Slevin	33,800
"	1030 S. 28th	Gotton Groc	1015 S. 28th	40,000
"	3322 W. Broadway	F. Hohmann & Son	3401 W. Broadway	45,000
"	2901 Bank St	Davis Market	29th & Portland	60,000

EXHIBIT "A"—Continued

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Louisville	1901 W. Broadway	Madison Market	19th & Madison	50,000
"	2000 Bank St	Miller Bros	19th & Duncan	96,000
"	3401 W. Market	J. W. Pontrich	34th & Market	65,000
"	926 S. 18th St	NONE		
"	2600 W. Walnut	Prellis	27th & Walnut	25,000
"	1128 S. 32nd St	NONE		
"	2133 W. Market	Happell	22nd & Market	25,000
"	4301 W. Market	J. Becker	44th & Market	78,000
"	3402 W. Madison	Stietzletg Groc	34th & Chestnut	50,000
"	1031 Cecil Ave	F. Vertrees	40th & Greenwood	36,000
"	201 N. 26th	T. McShane	25th & Rowan	22,000
"	2201 W. Garland	Hoffman Groc	22nd & Garland	26,000
"	4103 W. Walnut	Riggies	41st & Cedar	35,000
"	1155 S. 18th St	NONE		
Shelbyville	540 Main St	B. B. Blakmore	Shelbyville	60,000
"	400 E. Main St	Hardesty Groc	Shelbyville	52,000
Springfield	Main St	McElroy & Sleader	Springfield	42,000

[fol. 292]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bardstown	Main Street	31.00	11.00	28.00	36.00	10.00	10.00	2.00	18.00	10.00 F.&V.	156
Campbellsville	112 Main St.	16.00	11.00	19.00	11.00	.....	.....	2.00	24.00	.....	83
Carrollton	424 Main St.	21.00	11.00	18.00	11.00	10.00	.....	2.00	24.00	.....	97
Elizabethtown	Irwin Block	6.00	11.00	26.00	36.00	.....	.....	2.00	48.00	.....	129
Eminence	#4 Kings Block	16.00	11.00	25.00	26.00	25.00	.....	2.00	12.00	.....	117
LaGrange	121 Main St.	11.00	11.00	39.00	11.00	10.00	.....	2.00	.....	.....	84
Lebanon	119 Main St.	12.00	11.00	64.00	62.00	.....	.....	2.00	77.00	.....	228
Louisville	1215 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2533 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1255 S. 18th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	633 S. 26th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2500 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	4130 W. Bdway	16.00	11.00	10.00	21.00	.....	25.00	.....	32.00	.....	115
"	2100 W. Walnut	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	501 N. 17th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3729 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1801 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3133 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2146 Duncan	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2239 W. Oak St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2301 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 S. 18th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	358 N. 26th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1030 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3322 W. Broadway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2901 Bank St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1901 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2000 Bank St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

EXHIBIT "B"—Continued

City	Address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Louisville	3401 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	926 S. 18th	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2600 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1128 S. 32nd St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2133 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4301 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	3402 W. Madison	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1031 Cecil Ave.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	201 N. 26th St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2201 W. Garland	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4103 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1155 S. 18th St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
Shelbyville	540 Main	16.00	11.00	34.00	11.00	50.00	25.00	2.00	35.00	20.00 Fish	204
"	400 E. Main	16.00	11.00	26.00	11.00	40.00	25.00	2.00	35.00	.....	166
Springfield	Main St.	16.00	11.00	26.00	11.00	10.00	.....	2.00	26.00	.....	102

[fol. 293] AFFIDAVIT OF LOUIE J. JONES

STATE OF KENTUCKY,
County of Jefferson, ss:

Louie J. Jones, being first duly sworn deposes and says as follows:

I am thirty-one years old and live with my family in Louisville, Kentucky. Ever since I was eighteen years old, I have engaged in the grocery business, having served in the following capacities with the following companies; two years as clerk in a Quaker Maid store; as a manager two years in a Quaker Maid store; as a manager four years in an A. & P. store, and as an assistant superintendent four years with the A. & P. and one year as superintendent with the A. & P., totalling thirteen years.

As superintendent for the A. & P. stores, my duties consist of the following: I have charge of sixty-five stores situated in the extreme east end of the city of Louisville. I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P., from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of

the stores under my supervision is in direct competition [fol. 294] with other stores which are carrying on the same kind of business as that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

These stores are located as shown in column one and two of the attached Exhibit which is labeled "Exhibit 'A'". The principal independent competitors who own and operate a single store are listed in columns three and four and the estimated sales of these independent competitors are listed in column five of Exhibit "A".

The sales of each of the Atlantic & Pacific stores which I supervise range between $40,000.00 and $70,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross retail sales of the A. & P. store in the immediate vicinity. For example: Charles Deckel doing business at 2443 Bardstown Road has an annual business which I estimate at $182,000.00. The A. & P. store which I supervise located at Bardstown & Dundee is in direct competition with this particular store; its gross sales are at least $80,000.00 less than the gross sales of Mr. Deckel's store.

Julius Strauss doing business at 716 South 3rd has sales which exceed the sales of the neighboring A. & P. store which I supervise by about $200,000.00.

The Mammoth Grocery located at 2nd & Jefferson has double the amount of sales of the A. & P. store situated at 306 W. Jefferson.

K. Young, doing business at 2nd & Magnolia, has sales of about $350,000.00. This is approximately $300,000.00 more than the sales of the store I supervise at 1411 South 2nd Street which is in direct competition with Mr. Young's store.

The same is true of Grimms' Grocery located at 1482 South 7th Street which store competes with the A. & P. store located at 1508 South 7th Street, and this is also true in the case of store run by Ice & Violette which competes with the [fol. 295] A. & P. store at 314 Woodlawn Avenue.

Each of the above listed stores is owned by either a corporation or an individual who does not own or operate any other grocery store. Each of the above stores is selling goods which are similar to the goods sold in the competing

A. & P. Stores. The manner of doing business is the same except that our business is cash and carry while the competing stores do a credit and delivery business. Each of the stores competing with the A. & P. Stores pay the same license taxes to the State, because they all sell the same goods sold in the A. & P. stores. In each case, the total license taxes, when added up and deducted from the tax which is charged to the stores competing with A. & P., under the Gross Sales Tax, practically wipes out this tax.

In the case of the A. & P. stores which I supervise, the deductions would not wipe out the tax imposed under the Gross Sales Tax Statute, because the sales of every A. & P. store in the State of Kentucky are aggregated and the taxes imposed on this basis.

The grocery business is highly competitive and the imposition of a large tax on the A.&P. stores I supervise, without a similar tax on the competing stores would enable those stores to undersell A.&P. and thereby take away the business from the stores which I supervise; however, by taking away this business and adding to their sales, these stores would not increase the tax which they would have to pay because each store would merely be taking the business of a particular A. & P. store which is in the same locality and the total gross sales would still be below $400,000.00, and the tax on this sum would be erased by the deductions allowed.

On Exhibit "B", I have listed the A. & P. stores which I supervise and I have also listed the taxes which these stores have to pay. The average sales of the competitive stores which are owned by an individual or a corporation which do not own more than one store, is about $50,000.00, the same as the average for the A. & P. stores.

Almost every grocery in Louisville handles soft drinks, oleomargarine, cigarettes and eggs. They would all be entitled, therefore, to the same deductions. A store doing $35,000.00 worth of business such as Yeader's Grocery, Highland Park, would have a tax to pay of $17.50; under the Gross Sales Tax Law his deductible tax would be at least [fol. 296] $30.00, because he sells cigarettes, oleomargarine, soft drinks and eggs. As a result, Yeader would have no sales tax to pay. I supervise a store which is about a block away from Yeader's Grocery; its sales are around $50,000.00 but it would have a tax to pay because its sales would be aggregated with the sales of all the other A. & P. stores.

Mr. Goemer operates a store at the corner of Baxter & Hamilton; his sales are below $50,000.00 and are almost the same as the sales of the A. & P. store which I supervise located at 426 Baxter Avenue. These two stores are direct competitors. Under the Gross Sales Tax Law, Mr. Goemer would have no tax to pay but the tax on the competitive store which I supervise would be about $500.00.

I supervise a store at 1496 South Shelby; it has grocery sales of around $50,000.00 which is about the same as the sales of Ziegler's Grocery located at Shelby & Burnett. Ziegler's tax would be about $25.00. Both of these stores sell cigarettes, oleomargarine, eggs and soft drinks. As a result, the license tax Ziegler pays would allow him to deduct his entire tax. The tax on the store which I supervise, which is in direct competition with Ziegler's store, would be about $566.00; the deduction would amount to about $60.00 and, as a result, my store would have a $500.00 tax to pay.

The same is true in the case of all the stores which I supervise; in every case, the competitive store which is operated by an individual or a corporation having no other stores, would be excused from paying anything under the Gross Sales Tax, but the stores which I supervise would have to pay $500.00.

The reason for this is that The Great Atlantic & Pacific Tea Company has about thirteen million dollars ($13,000,000.00) worth of sales in the State of Kentucky. It operates 217 stores; every store in the State of Kentucky will pay nearly one per cent on its sales, making an average tax of about $566.00 as against nothing for competitors, except a limited and relatively few who own a large number of stores and have aggregate sales of over $400,000.

Profits from the store operations in my district average [fol. 297] between 1½% to 2% on gross sales. A $500 tax per store is oppressive and prohibitive. It is practically impossible to operate any store and secure a reasonable return for money invested and at the same time pay a $500 tax per store. It would be impossible to increase business and make a profit because the increased business would be subject to a one per cent tax which would eat up the entire profit. It would be impossible to open any new stores in my territory without paying one percent on all of the sales in the new store; however, any one of the persons operating a

single store which competes with the stores which I supervise could open new stores without paying any tax.

Many of the stores which I supervise are under long term leases. If the gross sales tax law is imposed, they could not be operated at a profit, and, if they would be closed, heavy losses would be involved. The stores which are competing with the stores that I supervise are not subject to any tax and, as a result, they can undersell A. & P. by accepting a profit which is one per cent lower than the profit we would have to accept because of the Gross Sales Tax Law. The increased business which these stores would get, as a result, would not be taxable.

Many of the stores competing with the stores that I supervise are now members of coperative associations. As a result, purchases are made by central headquarters; they can buy in quantity; they have common prices; men visit these stores much in the same manner as I visit the stores under my control and make recommendations in regard to show windows, selling points, and prices, therefore, these competitive stores have every advantage which the A. & P. stores have. There are a great many stores affiliated with cooperative associations in my district and I understand that if the gross sales of all these stores were aggregated, the tax which would be imposed would be about one per cent; however, as the act works out, there is no tax imposed on the competitors of A. & P.

Each store under my supervision is a separate unit in the A. & P. organization—separate books are kept. Each expense which a store incurs is allocated and charged against that store. Taxes and licenses are charged against the store. The same is true of purchases made by the store and money received is credited to each store.

[fol. 298] Louie J. Jones.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 299]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company
Sup't Louie J. Jones' Territory

City	Address	Principal Independent Competitors		Estimated annual sales
		Firm name	Address	
Louisville	1301 Bdstn. Rd.	Major Taylor	1305 Bdstn. Rd.	$260,000
"	1800 Frankfort	V. A. Schmitt	1577 Frankfort	39,000
"	2700 Frankfort	Hudsons Market	2720 Frankfort	83,200
"	1902 S. 3rd St.	H. G. Brooks	1800 S. 3rd St.	300,000
"	401 E. Broadway	Hornick	656 S. Preston	78,000
"	701 W. Broadway	Abraham	717 W. Broadway	31,200
"	1272 S. Preston	Snyders Grocery	Preston & Ormsby	36,400
"	3030 S. 4th St.	Mettars Grocery	4th & Central	62,400
"	904 S. Shelby	Wigginton Grocery	Shelby & Breck	52,000
"	1237 S. Shelby	Harsteins	Shelby & Shelby Pkway	52,000
"	801 E. Broadway	Raque	709 E. Broadway	78,000
"	844 E. Market	F. Hegan	901 E. Market	57,200
"	1552 Garland Ave.	Schuckman	16th & Kentucky	78,000
"	Bdstn. & Dundee	Chas. Deckel	2443 Bdstn. Rd.	182,000
"	1536 S. Fourth	NONE		
"	842 S. 1st St.	W. M. Dresel	712 S. 2nd St.	31,200
"	994 Barret Ave.	Ruffra Bros.	1400 Hepburn	57,200
"	2831 Taylor Blvd.	Young Groc.	2717 Montana	46,800
"	852 S. 3rd St.	Julius Strauss	716 S. 3rd St.	260,000
"	4518 Park Blvd.	Yeadens Grocery	Highland Park	31,200
"	306 W. Jefferson	Mammoth Grocery	2nd & Jefferson	104,000
"	1411 S. 2nd St.	K. Young Groc.	2nd & Magnolia	364,000
"	2255 Frankfort	Ed. L. Elinger	2257 Frankfort	44,200
"	1501 Story Ave.	Stacy	Story & Adams	52,000
"	426 Baxter Ave.	Goemer	Baxter & Hamilton	36,400
"	983 Goss Ave.	J. Hellman	Goss & Krieger	62,400
"	1508 S. 7th St.	Grimms Groc.	1482 S. 7th St.	104,000
"	314 Woodlawn	Ice & Violette	524 Woodlawn	104,000
"	701 Fehr Ave.	J. L. Moses	640 Fehr Ave.	26,000

"	3471 Taylor Blvd	G. W. Baker, Jr.	3450 Taylor Blvd		78,000
"	1501 W. Broadway	Newman	15th & Magazine		39,000
"	1496 S. Shelby	Zieglers	Shelby & Burnett		52,000
"	3764 S. Third St.	Sam Krietman	3115 S. 4th St.		62,400
"	2632 S. 4th St.	A. J. Schmitt	2700 S. 4th St.		93,600
"	201 W. Broadway	Groden	643 S. 2nd St.		36,400
"	2046 S. Preston St.	Goldstein	Preston & Barbee		41,600
"	1001 S. 5th St.	I. Krietman	1026 S. 5th St.		31,200
"	901 S. Preston	Jacobsons Grocery	Preston & Breck		46,800
"	1160 S. 1st St.	Altmans	First & Oak		31,200
"	613 W. Walnut St.	Eichel	511 S. 7th St.		36,400
"	1134 E. Breck	Schultz	Vine & Breck		31,200
"	2868 Frankfort	Roy H. Potts	329 Stilz Ave.		62,400
"	1449 S. Brook	NONE			
"	248 E. Market	Klein	Preston & Jefferson		312,000
"	944 E. Walnut	Geo. Scheibert	1001 E. Walnut		41,600
"	1912 Bdstn. Rd.	Habig	Richmond Dr. & Bdstn		52,000
"	1614 Bdstn Rd.	Heckman's Groc.	1514 Bdstn Rd.		57,200
"	625 Baxter Ave.	Joseph	Baxter & Rogers		46,800
"	971½ Baxter Ave.	Scheifers	Baxter & Highland		52,000
"	4101 S. Preston	Bergenroths	Camp Taylor		26,000
"	1032 W. Market	Sam Baron	1002 W. Market		26,000
[fol. 300]					
Louisville	1232 W. Walnut St.	P. Rheinhard	1234 W. Walnut		36,400
"	1429 W. Market	Simpson	15th & Jefferson		20,800
"	605 W. Oak Street	Ben Bass	1158 S. 7th St.		78,000
"	801 S. 6th St.	H. S. Cohen	800 S. 6th St.		31,200
St. Matthews		Roby & Clemens	St. Matthews		93,600
Louisville	1001 E. Oak St.	Baynes Groc.	Swan & Oak Sts.		52,000
"	1101 E. Burnett	Zieglers	Hickory & Burnett		52,000
"	1600 W. Oak St.	Hoffman	1514 W. Oak St.		18,200
"	733 S. Brook St.	Wm. Mehl	Brook & Jacob		15,600
"	438 E. Atwood	Barnes	Jackson & Atwood		44,200
"	203 W. Walnut St.	Schindler	2nd & Walnut		15,600
"	4401 Park Blvd.	Beisler	Highland Park		41,600
"	4204 Taylor Blvd.	G. Walker & Son	4231 Taylor Blvd.		78,000
Shively	18th St. Road	E. W. Kiroy	St. Helens		52,000

[fol. 301]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Louie J. Jones' Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Louisville	1301 Bardstown	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1800 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2700 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1902 S. 3rd	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	401 E. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	701 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1272 S. Preston	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	3030 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	904 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1237 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	801 E. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	844 E. Market	16.00	11.00	11.00	21.00	.....	25.00	.....	31.00	.....	115
"	1552 Garland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	Bdstn. & Dundee	16.00	11.00	10.00	21.00	.....	25.00	.....	31.00	.....	117
"	1536 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	114
"	842 S. First	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	994 Barret	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2831 Taylor Bl	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	117
"	852 S. 3rd St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	116
"	4518 Park Blv	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	306 W. Jeff	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1411 S. 2nd	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2255 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 Story	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	426 Baxter	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	983 Goss Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1508 S. 7th St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	314 Woodlawn	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	701 Fehr Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

.....3471 Taylor Bl.....	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
.....1501 W. Bdway.....	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
.....1496 S. Shelby.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....3764 S. 3rd St.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....2632 S. 4th.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....201 W. Bdway.....	16.00	11.00	12.00	11.00	.....	35.00	.....	31.00	.....	116
.....2046 S. Prestn.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1001 S. 5th.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....901 S. Preston.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1160 S. 1st.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....613 W. Walnut.....	16.00	11.00	12.00	21.00	.....	.....	.....	31.00	.....	91
.....1134 E. Breck.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....2868 Frankfort.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1449 S. Brook.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....248 E. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....944 E. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1912 Bardstown	16.00	11.00	12.00	21.00	.....	25.99	.....	31.00	.....	116
.....1614 Bardstown.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....625 Baxter.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....971½ Baxter.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4101 S. Preston.....	10.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	110
.....1032 W. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1232 W. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1429 W. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....605 W. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....801 S. 6th.....	16.00	11.00	12.00	21.00	.....	25.90	.....	31.00	.....	116
.....St. Matthews.....	16.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....	71
.....1001 E. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1101 E. Burnett.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1600 W. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....733 S. Brook.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....438 E. Atwood.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....203 W. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4401 Park Blvd.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4204 Taylor."	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....Shively.....	6.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....	71

[fol. 302] AFFIDAVIT OF BRACK M. FERRILL

STATE OF KENTUCKY,
County of Jefferson, ss:

Brack M. Ferrill being first duly sworn deposes and says as follows:

I am thirty-six years of age and live in Evansville, Indiana. I have been in the grocery business for eleven years and during that period I was associated with Quaker Maid, Inc., and The Great Atlantic & Pacific Tea Company. I started in as a store manager, then I was assistant superintendent of several stores, and for the last three years I have been superintendent of a district comprising certain Kentucky stores. There are sixty-six stores under my control and supervision in this district of which eighteen stores are situated in Kentucky.

My duties as superintendent require that I visit each of the stores under my supervision approximately once a month. I am familiar with the retailing of groceries in the territory under my supervision; with the affiliation of the grocery stores which are competing with the stores operated by The Great Atlantic & Pacific Tea Co.; with the character of the merchandise carried by competing merchants; with the number of clerks employed and its competing merchants and the general competitive conditions in the whole territory.

It is part of my duties to recommend to the central office any need for expansion in the territory and I inform the Company of the advisability of opening up new stores. I am familiar with the taxes which are assessed against each store and which are paid by both the Altantic & Pacific Stores and by the stores operated by competitors.

There is listed on Exhibit "A" attached hereto and made a part hereof in columns 1 and 2 the stores operated by The Great Atlantic & Pacific Tea Co., which are under my [fol. 303] supervision. On the same line as each store there is listed in column (3) the independent store or stores which competes with the Atlantic & Pacific Store. These stores are owned by individuals or corporations, who to my knowledge do not own or operate other stores. The addresses of these competing stores are listed in column (4)

of Exhibit "A", and the estimated annual sales of each competitive store is listed in column (5).

The average annual sales of each of the Atlantic & Pacific Stores under my supervision is approximately $50,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store to the best of my belief exceed the gross retail sales of the Atlantic & Pacific store in same locality:

Central City

Firm	Street	Approx. gross sales
Atlantic & Pacific Store	109 Broad St.	$80,000
Ruby's	Same block	130,000

Glasgow

Atlantic & Pac. Store	Green & Main Sts.	70,000
H. Cherry	Same block	100,000

Owensboro

Atlantic & Pac. Store	120 E. 2nd St.	60,000
Thomas Bader	434 W. 4th St.	150,000

Princeton

Atlantic & Pac. Store	123 W. Main St.	50,000
A. Kalinsky	Half block away	80,000

In every case the Atlantic & Pacific Stores and competitors are similar; they are selling the same class of goods to the same public.

There is no monopoly in grocery business in the district over which I have supervision. There are a great number of stores and the field is highly competitive. The Atlantic [fol. 304] & Pacific stores are subject to the same taxes as the stores of those competitors similarly situated. On Exhibit "B" there is listed the taxes which each Atlantic & Pacific store under my supervision pays.

The average sales of the competitive stores owned by individuals or corporations which do not own more than one store do not average in excess of about $50,000.00.

Fifty per cent of all the competitors who operate only a single store in my opinion do not average more than

$25,000.00 gross sales per year. At present the tax paid by these grocery stores exceeds sales tax and as a result the reductions which they are allowed to take would entirely offset the sales tax.

The Atlantic & Pacific Stores under my supervision sell Oleomargarine, Cigarettes, Soft Drinks and Candled Eggs. They pay $11.00 for the right to sell Oleomargarine; $11.00 for the right to sell Cigarettes and $2.00 as a license for candling eggs. Most of the stores competing with the Atlantic & Pacific stores under my supervision sell Oleomargarine, Soft Drinks and Cigarettes and many of them candle Eggs.

The deductable tax, therefore, in each case is the same; however, the tax levied on the Atlantic & Pacific stores is much higher because the sales of all Atlantic & Pacific stores in the State of Kentucky are added together, thus putting each store in a higher bracket and making them subject to a one per cent tax. Each Competitor, however, who operates only a single store is taxed on the sales in that store and as a result he only pays 1/20 of 1%. This tax is completely offset by the deductions he is allowed to take. For example, the White Front Grocery Co., operates a grocery store in Henderson, Ky., and no other stores, as far as I know, are owned or operated by this same person who runs this particular store. The gross sales in the case [fol. 305] of the White Front Grocery Co., are about $50,000.00 a year. Figuring this tax on 1/20 of 1%, the operator of this store has a tax of $25.00; however if he sells Oleomargarine, cigarettes and candles eggs on which he pays a license tax of $24.00 he has no tax to pay. On the other hand, Atlantic & Pacific operates a store at 312 First St., in Henderson, Ky., which competes directly with the White Front Grocery Co. This store has the same special license fees. but the deduction would not affect the tax because the tax on the A. & P. store would be about $560.00 and after the deduction we would still have to pay about $500.00. This is caused by the fact that the sales on this particular store are added to the sales of all other Atlantic & Pacific Stores in the State of Kentucky. As a result we would have to pay 1% on our sales, whereas the White Front Grocery Co., only pays 1/20 of 1% on its sales. The method of conducting business in the case of the

White Front Grocery Co., is practically identical to the method which is used in the Atlantic & Pacific Store; public served by each of them is the same. Gross sales in each store is about the same, but in the one case we pay a $500.00 tax, whereas they pay nothing.

Profits from store operations in the district over which I have supervision average about 1½ to 2½%. A 1% tax on gross sales would take between ⅔ to ½ of this profit. A $500.00 tax on each store is prohibitive and confiscatory. It would be impossible to increase business and make additional profit because practically all of the increased profit would be taken by the tax. It would be impossible to open new stores in my district in the cities in which stores are located at the present time because the profits from each store would be swallowed up by the tax. However, competitors who are taxed on 1/20 of 1% could open new [fol. 306] stores without paying any tax. Competitors not subject to the tax would be able to undersell the Atlantic & Pacific by accepting a smaller profit but they would not have to pay 1% tax on this increased business. Some of the stores under my supervision are leased from the owners under long term leases and to abandon these stores would involve considerable loss.

Many of the individuals operating stores which compete with Atlantic & Pacific, who do not own any other store are members of co-operative associations. In that portion of Kentucky in which I have supervision United Merchants Association known as the Urma Stores and Independent Grocers Alliance known as I. G. A. are the leading co-operative associations. Members of these co-operative associations receive the benefits of mass buying, mass merchandising and common advertising. The salesmen sent out by Independent Grocers Alliance and by United Retail Grocers Association advise the members in regard to uniform store windows, advertising displays and other questions arising in regard to the retailing of merchandise. This is similar to the service rendered by supervisors of stores in the Atlantic & Pacific organization. I believe that if the sales of all the members of each separate co-operative were aggregated each member of the association would have to pay the higher tax; however, under the Kentucky Sales Tax Law each member of the cooperative comes in

the bracket; as a result he has a low rate of taxation. On the other hand, the Atlantic & Pacific Stores are taxed 1%.

Each Atlantic & Pacific store under my supervision is a separate unit, under a manager whose salary is based on the amount of sales of his particular store. Separate records are kept for each store. The taxes levied each store are charged against that store. Each store is charged with goods purchased by it and credited with the sales which it makes.

[fol. 307] Brack M. Ferrill.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 308]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Address	Principal Independent Competitors		Estimated annual sales
		Firm name	Address	
Bowling Green	939 State St.	None	None	.....
Bowling Green	216 Main St.	Thomas Bros.	Bowling Green	$104,000
Central City	109 Broad St.	Ruby's	Central City	130,000
Franklin	406 Depot St.	F. M. Ruder	Franklin	78,000
Glasgow	Green & Main St.	H. Cherry	Glasgow	104,000
Greenville	109 W. Main	Star Market	Greenville	62,400
Henderson	312 First St.	White Front Gro. Co.	Henderson	45,000
Hopkinsville	123 Ninth St.	Walker	Hopkinsville	62,400
Horse Cave	S. S. Main St.	Stuart	Horse Cave	41,600
Madisonville	132 S. Main St.	McGary & Butler	Madisonville	41,600
Morganfield	Court St.	Waggener Grocery Co.	Morganfield	52,000
Owensboro	120 E. 2nd St.	Thomas Bader	Owensboro	100,000
Owensboro	1006 E. 4th St.	R. Bratcher	Owensboro	52,000
Owensboro	225 W. 2nd St.	Frederica Market	Owensboro	80,000
Princeton	123 W. Main St.	A. Kolinsky	Princeton	78,000
Providence	109 Broadway	A. Niswoner	Providence	104,000
Russellville	123 N. Main St.	Cooksey	Russellville	62,400

[fol. 309]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bowling Green	939 State	12.00	11.00	7.00	22.00	14.00	.....	2.00	31.00	.....	99
Bowling Green	216 Main	12.00	11.00	9.00	22.00	14.00	.....	2.00	31.00	.....	101
Central City	109 Broad	6.00	11.00	35.00	11.00	15.00	.....	2.00	102.00	.....	182
Franklin	406 Depot	6.00	11.00	19.00	11.00	.....	.....	2.00	39.00	.....	88
Glasgow	Green & Main	12.00	11.00	.....	26.00	10.00	.....	2.00	25.00	.....	86
Greenville	109 N. Main	6.00	11.00	63.00	36.00	5.00	5.00	2.00	45.00	.....	173
Henderson	312 First	16.00	11.00	13.00	21.00	20.00	.....	2.00	45.00	.....	128
Hopkinsville	123 Ninth	12.00	11.00	22.00	22.00	24.00	35.00	2.00	36.00	.....	164
Horse Cave	S. S. Main	6.00	11.09	17.00	11.00	17.00	.....	2.00	.....	.....	64
Madisonville	132 S. Main	12.00	11.00	21.00	22.00	.....	.....	2.00	23.00	15.00 Butter	106
Morganfield	Court St.	6.00	11.00	39.00	11.00	.....	.....	2.00	48.00	.....	117
Owensboro	120 E. 2nd	11.00	11.00	.....	11.00	10.00	.....	2.00	.....	.....	45
Owensboro	1006 E. 4th	11.00	11.00	13.00	11.00	10.00	.....	2.00	35.00	.....	93
Owensboro	225 W. 2nd	11.00	11.00	25.00	11.00	10.00	.....	2.00	35.00	.....	105
Princeton	123 W. Main	11.00	11.00	42.00	11.00	.....	10.00	2.00	.....	.....	87
Providence	109 Broadway	6.00	11.00	30.00	11.00	.....	.....	2.00	37.00	.....	97
Russellville	123 N. Main	6.00	11.00	.....	11.00	.....	.....	2.00	.....	.....	30

[fol. 310] AFFIDAVIT OF ALBERT C. HUNEKE

STATE OF OHIO,
County of Hamilton, ss:

Albert C. Huneke, being first duly sworn, deposes and says:

My name is Albert C. Huneke. I am 57 years of age and I live in Cincinnati, Ohio. I am Manager of the Cincinnati Packing House, owned and operated by The Kroger Grocery & Baking Company. This packing house is situated on the northeast corner of Bank & Winchell Streets. I have charge of all operations conducted at this plant, and all work is done under my direct supervision.

I am acquainted with the receiving, slaughtering, preparation and shipping of all products handled at this plant.

Shipments to this packing plant from various vendors are segregated upon delivery and they are kept apart at all times. We receive cattle, poultry, hogs and sheep from the Kroger Farm, which is located on the Louisville Pike near Cleves, Ohio, in the State of Ohio. As soon as any animal received from Kroger is killed, it is marked with a stamp, of which the following is a facsimile:

THE KROGER GROCERY
FARM PRODUCT
AND BAKING CO.

Poultry is marked on the leg with the following stamp:

[fol. 311] Upon being slaughtered, all products are kept in the chill room. They are then shipped to Kroger stores where they are sold at retail. Beef is delivered in trucks without being wrapped, and it is sold in exactly the same condition that it is shipped, except that the clerk or manager of the store cuts it into smaller portions. This is true of beef which is shipped from Ohio to our Kentucky stores, that is, the beef is sold in the same condition it is in when being transported across the state line.

Some of the products derived from animals received from the Kroger Farm are sent to the Kentucky stores operated by The Kroger Grocery & Baking Company, where they are sold at retail.

Albert C. Huneke.

Sworn to before me and subscribed in my presence this 27 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 312] AFFIDAVIT OF WALTER WENDEROTH

STATE OF OHIO,
Hamilton County, ss:

Walter Wenderoth, being first duly sworn, deposes and says as follows:

My name is Walter Wenderoth. I am 44 years old, and I live with my family in Bellevue, Kentucky. I am associated with The Kroger Grocery & Baking Company, in the capacity of Meat Superintendent for its stores located in Campbell and Kenton Counties and the neighboring vicinity.

As Meat Superintendent, I have charge of the Meat Departments in each of the Kroger stores, and I am familiar with the stock carried and the sales made.

The Kroger stores under my supervision are supplied with meats and poultry by the Cincinnati Packing House of The Kroger Grocery & Baking Company. They are also supplied with products which we purchase from C. Rice and Joe Rice, who operate packing plants in Kentucky. We also purchase meats from Armour & Co. and Swift & Co., which is sold in the Kentucky stores.

Among the products received from the Cincinnati Packing House of the Kroger Grocery & Baking Company are some which are derived from animals raised at the Kroger Farm, and these products are sold at retail in the Kentucky stores under my supervision.

The Meat Departments in each of the Kroger stores are entirely distinct from the Grocery branch of the business. Each meat store competes with the neighboring meat stores and it is not affected by neighboring groceries who do not sell meat. Many of the neighboring meat stores compete directly with the Kroger meat stores, which are owned and operated by individuals, partnerships or corporations, who do not own or operate any other store in the [fol. 313] state of Kentucky, and many of these singly owned stores are larger and have greater sales than the competing Kroger stores. For example: Frank Trik on Monmouth Street in Newport, has greater sales in meat than the Kroger store across the street. Trik also handles oleomarg-ine and the State License which he pays would relieve him from the obligation of paying any tax under the Gross Sales Tax Law of Kentucky. The Meat Department in the Kroger store which is across the street would have a One (1%) per cent tax to pay.

Beckers Brothers Company, operating a meat store on Monmouth Street in Newport, also outsell the Kroger store which is in the neighborhood. Although this Kroger store is only a square away and the meat it sells does not differ from the meat sold in Becker Brothers Company store, its sales would be subject to a One (1%) per cent tax. The Becker store on the other hand, would only have to pay One-twentieth (1/20th) of One (1%) per cent, because their sales do not exceed $400,000, and in fact they are much lower. The sales in the competing Kroger store are very much below $400,000, but the sales are combined with the sales in all other Kroger stores, whether they are sales of meats or groceries, and the aggregate sales are taxed One (1%) per cent.

We endeavor as a general rule, to make about Two (2%) per cent profit per dollar of sale, and the assessment of a One (1%) per cent tax would deprive us of about Fifty (50%) per cent of this profit. Such a tax is exorbitant and confiscatory, and would make it unprofitable to operate the Meat Departments under my supervision. In the event

we would increase our sales or in -he event we opened new Meat Departments in Kroger Stores, we would be subjected to a One (1%) per cent tax. Our competitors, however, could increase their sales or open new meat stores in the neighborhood of Kroger stores without subjecting them-
[fol. 314] selves to more than a tax of One Twentieth (1/20th) of One (1%) per cent.

Walter Wenderoth.

Sworn to before me and subscribed in my presence this 28th day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 315] AFFIDAVIT OF FRANCIS BALLARD

STATE OF KENTUCKY,
County of Kenton, ss:

Francis Ballard, being first duly sworn, deposes and says as follows:

My name is Francis Ballard, and I live at 2316 Greenup St., Cov., Ky.

I am the Manager of the Meat Department in Store #658, operated by The Kroger Grocery & Baking Company, at 1253 Highway, Covington, Kentucky, and my duties consist of the management of my department and the selling of meats to the public at retail.

We receive meat which we sell at this store from Armour and Swift in Chicago, and from The Cincinnati Packing House, Bank & Winchell Streets, Cincinnati, Ohio, which is owned by The Kroger Grocery & Baking Company. We have received meat and poultry from the Cincinnati Packing House which was derived from animals raised on the Kroger Farm. All of these products have a special stamp which reads: "The Kroger Grocery & Baking Company—Farm Product."

These products have been sold at retail to the general public in my store by myself and by my clerks.

Francis Ballard.

Sworn to before me and subscribed in my presence this 27 day of January, 1931. John Weisenberger, Notary Public, Kenton County, Ky. My commission expires April 18th, 1932. (Seal of J. Weisenberger, Notary Public, Kenton County, Kentucky.)

[fol. 316] AFFIDAVIT OF RUFUS BLUME

STATE OF OHIO,
County of Hamilton, ss:

Rufus Blume, being first duly sworn, makes the following statement under oath:

My name is Rufus Blume, I am 54 years of age and live in Cincinnati, Ohio.

I am employed by the Kroger Grocery & Baking Company in the capacity of Superintendent of the Dairy plant operated by Kroger on Florence Avenue, Cincinnati, Ohio. All the work done at this plant in regard to the receiving, treating and shipment of milk and creamery products is under my direct supervision.

The Kroger Grocery & Baking Company purchases milk from farmers in the vicinity of the City of Cincinnati, and this milk is collected by milk route operators who bring it to the dairy plant on Florence Avenue in Cincinnati, Ohio. The containers of each farmer bear special identification marks in order that each vendor may be properly charged with the credits due him after the milk received is weighed.

In addition to receiving milk from farmers who sell to The Kroger Grocery & Baking Company, we also receive milk at the dairy plant from the farm which is conducted by The Kroger Grocery & Baking Company on the Louisville Pike, near Cleves, Ohio. This milk is brought in by O. W. Vaughn, who operates Route #800.

After the milk is received, it goes through the process of Pasteurization, and this is done in the most hygienic and approved fashion. Once the milk is poured into the vats, it goes through the whole process of Pasteurization automatically, and it is even bottled mechanically. The bottled milk is delivered in Kroger trucks to the various

[fol. 317] stores which the company operates in this vicinity, where it is sold at retail. We make deliveries from this plant to the stores operated by Kroger in the cities of Covington, Newport and Bellevue, Ky., and the stores in the neighboring territory. Our milk is sold in the same bottles that leaves the Kroger plant, and milk sold at retail in the Kentucky stores is in the same bottle that was used to transfer it from Ohio to Kentucky.

The milk which we receive from the farm conducted by The Kroger Grocery & Baking Company is poured into a special vat and it is bottled separately. Some of this milk is shipped to Kroger stores in the State of Kentucky, and it is there sold at retail.

R. B. Blume.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.

[fol. 318] AFFIDAVIT OF O. W. VAUGHN

STATE OF OHIO,
County of Hamilton, ss:

O. W. Vaughn, being first duly sworn, deposes and says as follows:

My name is O. W. Vaughn, and I live at Guilford, Indiana. I conduct what is called a "milk route" and my work consists of the collecting of milk from the various farmers in territory which I cover, and the delivery of that milk at the dairy plant of The Kroger Grocery & Baking Company on Florence Avenue, Cincinnati, Ohio.

My route takes in a radius of about twenty miles around Guilford, Indiana. This includes the territory surrounding Cleves, Ohio.

I collect milk from the farm conducted by The Kroger Grocery & Baking Company on the Louisville Pike near Cleves, Ohio, and I deliver that milk at the dairy plant conducted by The Kroger Grocery & Baking Company, Florence Avenue, Cincinnati, Ohio.

The cans of different farmers bear special identification marks, and each farmer is credited with the milk that I deliver at the Kroger plant after the same is weighed.

O. W. Vaughn.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial Seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 319] AFFIDAVIT OF JOHN C. SCHWARZ

STATE OF KENTUCKY,
County of Jefferson, ss:

John C. Schwarz, being first duly sworn, makes the following statement under oath:

My name is John C. Schwarz and I live in Louisville, Ky. I am Treasurer of Gray-Von Allmen Sanitary Milk Co., a corporation organized under the law- of Delaware.

The Gray-Von Allmen Sanitary Milk Co. produces milk and sells it at retail in the City of Louisville and in the surrounding territory. The Gray-Von Allmen Sanitary Milk Co. maintains an establishment at the corner Oak St. and Garvin Place, Louisville, Ky. at which establishment milk is sold at retail to the general public.

The Gray-Von Allmen Sanitary Milk Co. owns and operates a dairy farm at LaGrange Kentucky and it produces milk at this farm which is sold at retail. A portion of the milk produced on this farm is sold at retail at the establishment maintained by the company for the retail sale of milk at the corner Oak and Garvin Place, Louisville, Kentucky.

The Gray-Von Allmen Sanitary Milk Co. is, therefore, actually engaged in farming and selling farm products raised by them in this State and by reason thereof it comes within the exception provided for in Clause One of the Kentucky Gross Sales Tax Law and is exempted under the terms of the Act.

(Signed) John C. Schwarz.

Sworn to before me this 19 day of January, 1931. Adeline L. Lauer, Notary Public. My commission expires Dec. 30, 1931. (Seal of Adeline L. Lauer, Notary Public, Louisville, Ky.)

[fol. 320] AFFIDAVIT OF ERNEST THOMPSON

STATE OF KENTUCKY,
County of Fayette, ss:

Ernest Thompson, being first duly sworn, deposes and says that he is Chief of Police, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Ernest Thompson.

[Duly verified.]

[fol. 321] AFFIDAVIT OF M. R. ANDERSON

STATE OF KENTUCKY,
County of Fayette, ss:

M. R. Anderson, being first duly sworn, deposes and says that he is Safety Director, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

M. R. Anderson.

[Duly verified.]

[fol. 322] AFFIDAVIT OF C. J. HENRY

STATE OF KENTUCKY,
County of Fayette, ss:

C. J. Henry, being first duly sworn, deposes and says that he is Chief of the Fire Department, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards except in an arithmetical ratio.

Further affiant sayeth not.

C. J. Henry.

[Duly verified.]

[fol. 323] AFFIDAVIT OF HARMON NOE

STATE OF KENTUCKY,
County of Harlan, ss:

I, Harmon Noe, being first duly sworn, deposes and says that he is Chief of Police, of the City of Harlan, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Harmon Noe,
Chief of Police.

[Duly verified.]

[fol. 324] AFFIDAVIT OF R. W. OWENS

STATE OF KENTUCKY,
County of Perry, ss:

R. W. Owens, being first duly sworn, deposes and says that he is Chief of Hazard Fire Department, of the City of Hazard, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

R. W. Owens.

[Duly verified.]

[fol. 325] AFFIDAVIT OF CRAWFORD LEE

STATE OF KENTUCKY,
County of Franklin, ss:

Crawford Lee, being first duly sworn, deposes and says that he is Chief of Police, of the City of Frankfort, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Crawford Lee.

[Duly verified.]

[fol. 326] AFFIDAVIT OF G. H. PARKER, MANAGER, KENTUCKY ACTUARIAL BUREAU

JEFFERSON COUNTY,
State of Kentucky, ss:

Affiant, G. H. Parker, states that he is the managter and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky Statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

[fol. 327] Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

Subscribed and sworn to before me by G. H. Parker this 13 day of January, 1931. My commission expires this 21 day of January, 1931. William E. Clark, Notary Public, Jefferson County, Kentucky. (Seal.)

[fol. 328] Louisville

AFFIDAVIT OF ROBERT J. MCKIM

STATE OF KENTUCKY,
County of Jefferson, ss:

Robert J. McKim, being first duly sworn, states:

1. I am thirty-five years of age and I am the President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewarts), a corporation organized under the laws of the State of Kentucky with its principal office and place of business in Louisville, Kentucky. I have been President of Stewarts since March 10, 1930, and prior to assuming that position I have been in the retail dry goods and department store business for sixteen years. Before entering this business I was a student at Tulane University. By virtue of my position and experience in the dry goods and department store business I am familiar with the methods customarily employed in conducting said business and with the general retail situation in the City of Louisville. By virtue of said fact and by making comparison with the sales of our own store, of which I have personal knowledge, I am qualified to estimate the approximate gross annual sales of other stores in the City of Louisville. I am familiar with the location and type of all of the larger retail stores in Louisville, and I have had an opportunity to and I have observed the nature, extent and character of their business. [fol. 329] I am likewise acquainted with many of the smaller establishments, and I have made a survey of the City and consulted with various department managers, buyers and executive officers of Stewarts with a view to fortifying my information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewarts, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewarts. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as

to determine whether or not a particular department is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewarts handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.00.

3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, [fol. 330] and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which I have made, as mentioned above, I have made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with my personal knowledge and the knowledge of the various department managers with whom I have consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which we make of our departments. Therefore, I have carefully examined the classifications made by the City Directory and in every instance reasonably possible I have listed all of the stores competing with us. This results in a classification of about ten different kinds of competition, thereby [fol. 331] furnishing as accurate an analysis of the general retail situation as I know how to make.

In the lists following I have in general omitted other department stores unless for particular illustration where I have noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that I know of:

Baptist Book Store	323 Guthrie Street
Ida M. Lang	912 E. Market Street
John P. Morton & Co.	420 W. Main Street
Southern Book Company	718 E. Market Street
W. K. Stewart Company	550 So. Fourth Street
Wilderness Road Bookshop	665 So. Fourth Street
Ye Booke Stalle	552 So. Third Street
The Raven Shop	921 Baxter Avenue

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of Stewarts would be $465.70 on sales made in those departments [fol. 332] approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-two specialized stores:

Louis Appel Co.	425 So. Fourth Street
Myer Berman & Sons	220 W. Market Street
Blach's Inc.	205 So. Fourth Street
Crutcher & Starks	656 So. Fourth Street
Cunning & Brotzge	301 W. Jefferson Street
Double Worth Clothes Shop	317 So. Fourth Street
Ellenstein Bros.	216 So. First Street
Family Credit Clothing Co.	212 West Market Street
Federal Clothing Stores	313 So. Fourth Street
Fischer Clothing Co.	1030 W. Market Street
Getzel and Sons	612 W. Market Street
M. Goldberg & Sons	204 So. Fourth Street
Max Goldsmith	354 E. Liberty Street
Goldstein Bros.	217 W. Market Street
Morris Goldstein	428 So. Preston Street
[fol. 333] Goldstein & Moseson	1100 W. Market Street
H. C. Graham	620 E. Market Street
B. W. Graves Co.	326 W. Market Street
Hauger Clothes, Inc	322 W. Market Street
Hauger's	126 W. Market Street
Hurwitz Co.	436 So. 9th Street
J. R. Hyman	132 E. Market Street
Interstate Stores Co.	602 W. Market Street
Klothes Shoppe	316 W. Market Street
L. & N. Clothing Co.	124 W. Market Street
Lehmann Bros.	977 So. Shelby Street
Levy Brothers	Market—Cor. Third Street
Liberty Clothing Co.	310 West Jefferson Street
Lovenhart & Co.	Cor. 3d and Market Street
The Men's Shop	136 W. Market Street
Menter Clothing Co.	333 W. Market Street
Hyman Meyers & Bros.	335 W. Market Street
Modern Clothing Co.	310 W. Market Street
Morris Clothing Co.	314 W. Market Street
Moseson and King	433 W. Walnut Street
New York Clo. Co.	543 W. Market Street
The Olshine Co.	231 So. Fourth Street

Rodes Rapier Co.	Fourth & Walnut Streets
Royal Clothes Shop	606 W. Market Street
Bawer Schuster	238 E. Market Street
Schuster Brothers	108 E. Market Street
Jacob Seligman	352 E. Market Street
S. L. Seligman	642 So. First Street
Shelbyville Overall Co.	117 W. Market Street
F. L. Simons	833 W. Market Street
Standard Outfitting Co.	404½ W. Jefferson Street
Chester Stern	1701 West Market Street
Stewart Clothing Shop	321 W. Market Street
J. B. Strauss & Co.	234 So. Fourth Street
Town Talk Clothes	206 West Market Street
Wearbest Cloth. Co.	302 West Market Street
Winner Clothiers	318 West Market Street
Roche & Roche	523 South Fourth Street
Wilson Bros.	629 South Fourth Street

[fol. 334] In my opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company	425 South Fourth Street
Levy Brothers	Market—Cor. Third Street
Lovenhart & Co.	Cor. Third and Market
Rodes Rapier Co.	Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boy's clothing and boy's furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon the dollar of sales of each of the above fifty-two stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments at Stewarts.

[fol. 335] C. Clothing Dealers—Women's and Misses—Retail

Under this heading the directory lists thirty-one stores to which I have added from other sources of information sixteen additional stores with the result that the following list is, in my opinion, complete:

Bon Ton Cloak and Suit Co. ..... 320 So. Fourth Street
Buell, Inc. ..... 441 So. Fourth Street
Butterfly Frocks ..... 317 W. Oak Street
Casse Frocks ..... 625 So. Fourth Street
Madeline Chez ..... 1468 St. James Ct.
Conrad Schultz ..... 607 So. Fourth Street
DuRand Perry Co. ..... 538 So. Fourth Street
Hyman Eichenholz ..... 716 W. Market Street
Elson's ..... 530 W. Market Street
Greenstein's ..... 216 W. Market Street
Hollywood Shops ..... 519 So. Fourth Street
The Howard Co. ..... 507 So. Third Street
Husch Brothers ..... 212 So. Fourth Street
J. A. Jaglowics ..... 309 Speed Building
Jerome's ..... 130 W. Market Street
Johnson's Fashioned Shop ..... 623 W. Walnut Street
LaMode Apparel Shop ..... 218 So. Fourth Street
Le-Chic Co. ..... 611 So. Fourth Street
The Lerner Shop ..... 517 So. Fourth Street
Lord's ..... 516 So. Fourth Street
Carrie Pembroke ..... 1122 W. Walnut Street
Redfern Garment Co. ..... 223 So. Fourth Street
Sag's Ready-to-Wear Shop ..... 104 W. Market Street
Specialty Shop ..... 1004 W. Walnut Street
Standard Outfitting Co. ..... 404½ W. Jefferson Street
Star Garment Co. ..... 628 W. Market Street
Virginia Dare Dress Shops ..... 609½ So. Fourth Street
Ward-Stilson Co. ..... 310 I. S. Life Bldg.
S. A. Weinberg ..... 1625 W. Market Street
Weinberger's ..... 303 W. Broadway
[fol. 336] Worth ..... 222 So. Fourth Street
Jenny Lind ..... 640 So. Fourth Street
Besten-Langen Company ..... 518 So. Fourth Street
Byck Bros. & Co. ..... 532 So. Fourth Street
Diamond Bros. ..... 546 So. Fourth Street

Evelyn-Ann Shoppe	617 So. 4th Street
Fallahay, Inc.	Martin-Brown Building
Fleischaker's, Inc.	1519 W. Market Street
Graves-Sanders	222 So. Fourth Street
P. E. Henchey	607 W. Main Street
Jay Lane, Inc.	448 So. Fourth Street
Joseph Jacob	Commercial Building
Mangels, Inc.	528 So. Fourth Street
Pandora Dress Shop	458 So. Fourth Street
Patti	Starks Building
Sally Frocks	522 So. Fourth Street
Yarbra Gast Co.	208 W. Market Street
H. P. Selman Co.	4th Street at Walnut

Of these stores more than one-half of them are located in the downtown shopping district where the competition for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00.

DuRand Perry Co.	538 So. Fourth Street
Besten-Langen Company	518 South Fourth Street
Byck Bros. Co.	532 So. Fourth Street
Mangels, Inc.	528 So. Fourth Street
H. P. Selman Co.	4th St., at Walnut

There is no essential difference between the methods of doing business of the above stores located in the downtown shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the [fol. 337] specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which I have added eight others, making the following complete list:

G. Bittner's Sons	427 So. First Street
Hubbuch Bros. & Wellendorff	619 So. Fourth Street
Hubbuch Jos. Sr. and Sons	890 West Market Street
George G. Fetter Company	410 W. Main Street

Burdorf Company.....427 So. Third Street
John W. Clare.....309 Guthrie Street
Dant Bros. .....1317 Bardstown Road
A. T. Duvall & Co. .....1315½ Bardstown Road
Elsie Kraziese Company.....624 Baxter Avenue
J. L. Strassel.....445 So. Third Street
Charlotte Whitehead.....305 W. Ormsby Avenue
Zach C. Offutt & Helm.....1244 So. Third Street

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

[fol. 338] E. Dry Goods—Retail

The Directory lists 152 stores other than department stores which handle dry goods.

The following department stores have, in my opinion (in all departments, including dry goods) sales in excess of $400,000.00.

J. Bacon & Sons.....334 West Market Street
Jefferson Dry Goods Company .....Fourth & Jefferson Streets
Kaufman-Straus Company...427 South Fourth Street
John C. Lewis Company.....450 South Fourth Street
Sears-Roebuck Company.....820 West Broadway
W. T. Grant & Company.....424 South Fourth Street
Ben Snyder Department Store .....522 West Market Street
Herman Straus & Sons.....Fourth & Market Streets

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in my opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

Max Abroms.....1008 W. Walnut Street
Lucille Akers.....1819 Portland Avenue
Phillip Albert.....3536 Greenwood Avenue
W. H. Allen.....2023 St. Louis Avenue
Ethel Appel.....426 So. Preston Street
Ralls Arnold.....4620 Park Blvd.
Sarah Arnold.....1008 East Oak Street
C. M. Baer.....847 E. Walnut Street
Barbee Way Dry Goods Co...2048 So. Preston Street
Abraham Bass.....1005 W. Walnut Street
[fol. 339] Myer Bass .....418 So. Preston
Beechmont Dry Goods Co....324 W. Woodlawn
Emma B. Benson.....1912 Bardstown Road
Besendorf C. P.....1459 So. Shelby
Jos. Bischof.....2062 So. Shelby
Samuel Bolstein.....1138 So. 7th Street
Boulevard Dry Goods Co....3501 Taylor Blvd.
W. F. Braun.....340 E. Ormsby
Lillian M. Breckel.....1922 So. Preston
Chas. Briskman.....210 E. Market Street
Maude Bryant.....329 North 25th Street
Mary E. Burkarth.....1228 So. Shelby Street
Margaret Butler.....4003 Shelby Rd.
Claude Campbell.....1402 Hemlock
T. O. Cecil.....301 North 34th Street
Dan Cohen.....748 E. Market Street
Jennie Cohen.....1450 So. 7th Street
Community Shoppe.....1503 Dixie Highway
Myrtle Conder.....2933 W. Walnut Street
E. & L. Conroy.....4001 Vermont Avenue
Conroy Shoppe.....1405 So. 2d Street
L. H. Crosby.....1602 Bardstown Road
F. J. Dalton.....844 E. Walnut Street
Max Dashoff.....336 E. Oak Street
Stella Daugherty.....616 Winkler Avenue
Elizabeth Dauth.....3507 W. Market Street
A. B. Davidson.....2932 So. Fourth Street
Jos. Davidson.....910 W. Market Street
Carrie Deeb.....2608 Portland
Ida M. Depeudry.....607 So. 28th Street
Barbara Dolfinger.....961 Charles

Anna Ernst.....1420 St. Anthony Place
Minnie Everett.....1735 W. Market Street
Ida Fierst.....1248 So. Shelby Street
Julia A. Fink.....1051 Bardstown Road
Abraham Fish.....122 E. Market Street
Henry Fleischaker.....632 E. Market Street
Moses Fleischer.....344 E. Market Street
Vincent Fleitz.....1832 Frankfort Avenue
[fol. 340] P. W. Frehling.....1149 So. 7th Street
J. H. French.....2326 Portland Avenue
B. Friedman & Son.....409 So. 7th Street
Morris Friedman.....906 W. Market Street
Phillip Friedman.....1002 W. Market Street
M. J. Gathof.....1718 Bardstown Road
Thersa Georgel (Mrs.).....1515 Story Avenue
Jessie A. Gray.....2340 W. Hill Street
Phillip Greenwald.....1105 W. Walnut Street
W. C. Guthrie.....1429 Washington
Nellie Hall.....962 So. 12th Street
Anna Harman.....1138 Goss Avenue
W. F. Hauck.....1000 Goss Avenue
Anna Heinzman.....785 So. Shelby Street
C. M. Herrman.....1241 Dixie Highway
W. S. Hert.....1039 So. 32d Street
Louis Herzberg.....1903 W. Broadway
Nora Heuger.....723 Vine Street
H. M. Hoffman.....3938 So. 2d Street
Alice Hofstatter.....3322 Rudd Avenue
Mary A. Holland.....2001 W. Walnut Street
Helen Howard.....118 E. Barbee Street
Edw. Howell.....2632 So. 6th Street
M. Hulsmeier.....948 Dixie Highway
S. L. Hymson.....457 So. 7th Street
Matilda Ising.....2207 So. Preston
Ida M. Jenkins.....657 So. 26th Street
Martha Kelcher.....2335 W. Market Street
Peter Karem.....131 E. Jefferson
J. P. Koch.....3312 W. Broadway
P. L. Kozlove.....328 E. Market Street
Krapp Dry Goods Co.....1506 Hickory
Lillian Krauss.....2232 Frankfort Avenue
Benj. Levine.....234 E. Market Street
Margaret M. Lowe.....2221 Wilson Avenue

Robt. Lucas	1810 Frankfort Avenue
Samuel Lurie	210 So. Floyd Street
Sadie Lynn	2210 Dundee Road
Isaac Lynn	532 So. Preston
[fol. 341] Norma Nagel	3319 W. Market Street
Thomas Maguire	1900 So. 4th Street
Anna M. Malin	2601 W. Kentucky Street
Elmore Marks	1231 W. Walnut Street
Marmor and Keniff	640 Lampton
Florence Mattingly	627 Baxter Avenue
Elizabeth A. Matz	1107 E. St. Catherine
Mary B. McCormack	1160 So. 15th Street
Miles Silk Shop	632 So. 4th Street
Meller Rose	1461 Dixie Highway
Lily K. Misback	645 E. Madison Street
Jessie Monroe	2932 Portland
Rady M. Morris	3934 So. Brook
Bessie Moss	506 So. Preston
P. B. Muier	1025 So. 28th Street
T. J. Naughton	918 So. Preston Street
Henry Niemeier Jr.	1136 So. 32d Street
C. C. Nolting	200 North 26th Street
Norman's Dry Goods Co.	535 W. Oak Street
G. L. Peal	1008 W. Market Street
E. W. Perry	4109 Reservoir Avenue
Kate Pfaffinger	1308 Story Avenue
J. F. and M. Pfeffer	1508 So. Shelby Street
Clara Pitt	1598 Fulton Street
Mrs. Prosper Plouvier	1426 W. Kentucky Street
Gus Potosky	315 So. 7th Street
Mrs. C. E. Ray	1702 Frankfort Avenue
John Renck	1511 So. 7th Street
Minnie B. Rice	4340 Taylor Blvd.
E. B. Rodman	312 Hiawatha
A. J. Roth	411 So. Preston Street
Alvina Ruschival	2332 W. Broadway
Josephine Sauer	3280 Taylor Blvd.
C. F. Schenck	1907 W. Market Street
Anna G. Schmitt	2014 W. Walnut Street
A. J. Schmitt & Sons	2704 So. 4th Street
J. Scholtes & Son	1704 W. Market Street

Belle Schulman	2501 Griffith Avenue
E. Schulman & Son	524 E. Market Street
[fol. 342] Alex Seligman	622 E. Market Street
Samuel Shaheen	2604 Portland Avenue
Morris Shersky	1430 W. Walnut Street
W. A. Shields	2734 Frankfort Avenue
B. H. Silverman	4444 Park Blvd.
Mrs. Lillian Stoker	1100 Logan Street
Gustave Stosberg	650 So. Shelby Street
Gertrude Stuckenberg	Poplar Level Road
Isaac Tennebaum	926 Baxter Avenue
Marie E. Tierney	2829 W. Market Street
R. E. Vaughn	301 North 19th Street
Mrs. Mary E. Vinson	4478 Park Blvd.
H. A. Vittitoe	902 So. 15th Street
Wackenthaler Jos.	1237 Logan Street
J. J. Walsh	1601 W. Ormsby
H. W. Waterman Co.	2453 Bardstown Road
Waterman and Taustine	636 W. Market Street
Anna E. Weber	992 Barret Avenue
Frederica Weber	992 Barret Avenue
Williams & Belinsky	410 So. Preston Street
Rosa Wilson	817 So. Preston
Samuel Winer	1732 W. Walnut Street
Katie Wiser	4400 Stolz
Philip Wolfson	1023 Dixie Highway
C. J. Wright	4456 Park Blvd.

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition.

However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

[fol. 343] F. Fur Dealers and Furriers

The following list includes to the best of my knowledge all of the stores in the City of Louisville, other than

Stewarts, handling furs. Due to the small number involved I have included department stores in this list with the specialized stores:

Lucille Cahill	664 So. 43d Street
Fifth Avenue Furriers	520 So. 5th Street
The Fur Shop	954 So. 3d Street
Green & Green Furriers	1138 So. 3d Street
Lee Furriers	201 W. Breckinridge Street
Louisville Furriers	208 Martin Brown Bldg.
New York Furriers	618 So. Fourth Street
Minnie B. Read	1108 So. First Street
Frank Schulman	1551 So. Bardstown Road
Gordon's Fur Shop	428 W. Chestnut Street
Younger the Furrier	637 So. Fourth Street
Besten & Langen	518 So. Fourth Street
H. P. Selman & Co.	Fourth & Walnut Streets
Durand-Perry Company	540 So. Fourth Street
Byck Bros. & Co.	532 So. Fourth Street
Kaufman-Straus & Company	427 So. Fourth Street
Herman Straus & Company	Fourth & Market Streets
J. Bacon & Sons	Fourth & Market Streets
John C. Lewis & Company	450 So. 4th Street
Bon Ton Cloak & Suit Co.	322 So. 4th Street

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in my opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed [fol. 344] above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated feature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

Allen and K. Furniture Store	430 E. Market
J. Bacon and Sons	334 W. Market
Bell and Moss	1400 W. Market
Bensinger Outfitting Co.	315 W. Market
G. Bittner's Sons	426 So. First
Block and Goldberg	619 W. Market
Brooklyn Furniture Co.	448 E. Market
Brown and Melville	1201 W. Walnut
Central Furniture Co.	226 W. Market
[fol. 345] Hyman Cohen	113 E. Market
Dant Brothers	1319 Bardstown Road
Denhard Co.	219 W. Market
A. K. Easley	746 E. Jefferson
H. C. Evans	312 E. Market
Gem Furniture Co.	826 W. Market
H. M. Gerber Co.	810 E. Broadway
Great Western Furniture Co.	720 E. Market
James Greene	419 E. Market
Albert Hess Furniture Co.	550 E. Market
Household Outfitting Co.	525 E. Market
Kaufman-Straus Co.	437 So. Fourth
Fred W. Keisker and Son	315 W. Walnut
Kelly's Furniture Co.	631 W. Market
Louis Kort and Sons	323 W. Market
Joseph Lang	525 E. Market
Leader Furniture Co.	319 W. Market
Liberty Outfitting Co.	334 E. Market
W. F. Mayer	413 W. Market
Morris Monsky	701 W. Market
Raffo's	426 W. Market
Reliable Furniture Co.	520 E. Market
Rhodes Burford Co.	626 E. Market
Rinne Furniture Co.	513 W. Market

Sage Furniture Co.	316 E. Market
Sales Furniture Co.	307 W. Market
Spurrier Furniture Co.	920 W. Market
Spurrier and Wortham	830 W. Market
Herman Straus and Sons	318 W. Market
W. B. Trumbo Co.	900 W. Market
United Furniture Co.	447 E. Market
Weiss Outfitting Co.	1604 W. Market
West End Furniture Ex.	1636 W. Market
Wilson Chase Co.	521 W. Main
P. Cohen and Son	221 E. Market
H. B. Fortwengler	633 So. 1st
E. Hyman	127 E. Market
Elsie Krazeise Co.	624 Baxter
O. K. Furniture Co.	804 W. Market
[fol. 346] Square Deal Furniture	423 E. Market
J. L. Strassel	445 So. 3d
A. Salas	345 E. Market
Bass Sales Co.	208 E. Market
I. Robinsons	814 W. Market
Jean Furniture Co.	802 W. Market
Jos. Hubbuch & Sons	800 W. Market
Sternau's	732 E. Market

Of the above, the sales of the following six stores exceed $400,000.00:

Bensinger Outfitting Co.	315 W. Market Street
Central Furniture Co.	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West Furn. Co.	720 E. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co.	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the

above fifty-six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

[fol. 347] The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be $950.00 less deductions. Compared with this the tax on the furniture department at Stewarts would be $1,097.96 after deductions on approximately 1-5th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here I have lumped together the stores listed under the following headings in the directory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In my opinion the following list includes all of the recognized music stores in the city:

Baldwin Piano Co.	Broadway Corner Third
Johnson Piano Co.	213 W. Walnut Street
Shackelton Piano Co.	324 W. Chestnut Street
F. M. Tiller	515 South Third Street
The Rudolph Wurlitzer Co.	628 So. Fourth Street
C. J. Baron	510 E. Market Street
Bruner Greenup Music Shops	307 So. Fourth Street
Lucinda E. Smith	1205 W. Walnut Street
Stump's Music Shop	427 E. Jefferson Street
A. J. Waldman	500 So. Preston Street
Gus Boldt Radio Co.	427 W. Chestnut Street
Broadway Radio Shoppe	713 E. Broadway
[fol. 348] P. I. Burks and Co.	911 W. Broadway
Cherokee Radio Shop	1315 Bardstown Road
Chiquelin Radio Co.	1587 Bardstown Road
Crescent Hill Radio Shop	2728 Frankfort Avenue
Thos. Crutcher, Jr.	1933 So. Fourth Street
Arthur Demling	2205 Frankfort Avenue
Ditto Radio Sales	3801 W. Broadway

Doup's Point Radio Shop	2435 Bardstown Road
S. C. Glass	2459 Bardstown Road
Grays Radio and Tire Service	104 Breckinridge Lane
Henderson Radio Corporation	501 W. Chestnut Street
Highland Radio Service	1021 Bardstown Road
Hills St. Radio Shop	1799 W. Hill Street
W. H. Hobbs	2129 Eastview Avenue
Jarrett Radio Co.	1521 Bardstown Road
Henry Kiefer	133 Amherst Avenue
J. C. Kirchdorfer	922 Baxter Avenue
W. F. Long	1837 Deerwood Avenue
Louisville B. T. Radio Co.	1763 Bardstown Road
Monarch Sales Co.	729 So. 8th Street
Parkland Electric Co.	1103 So. 26th Street
Portland Radio Co.	2614 Portland
Radio Corporation of Ky.	618 So. 2d
Radio Doctors	204 W. Market
Radio Service Shops	1022 Bardstown Road
F. G. Schack	619 So. 42d
Scientific Radio Corp	637 So. 18th Street
Southern Radio Co.	1801½ W. Market Street
Speedometer and Radio Shoppe	1007 E. Broadway
Stilz-Ave. Radio Shoppe	100 Stilz Ave.
Super Radio Co.	1134 So. 25th
Tiller-Langley Radio Shop	First Floor Breslin Bldg.
C. E. Watkins	1107½ Bardstown Road
O. W. Wittig	2537 Garland Ave.
Acme Electric Company	1162 So. 4th Street
Fourth Avenue Sales Co.	628 So. 4th Street
[fol. 349] Gas & Electric Shop	309 W. Chestnut Street
Bomar-Summers Hardware Co.	315 West Jefferson
Kelsall Music Company	909 West Broadway
Milliken Tire & Battery Co.	955 So. Third Stre-t
Alex J. Schultz	226 W. Broadway
The Sutcliffe Co.	225 So. Fourth Street
Greenfields Majestic Shoppe	2250 South Shelby Street
Wm. F. Schaetzly	1930 So. 3d Street
Charles Stauble	1806 Frankfort Avenue
Tonini's Radio Store	Shelby & Gray Streets
Albin H. Wunderlich	652 Baxter Avenue

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed

$150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in my opinion complete:

Mabel H. Bateman	410 Camp
Bilharz Millinery Co.	230 So. Fourth
Rose E. Burgy	1159 Dixie Highway
Pauline Clausen	130 E. Market Street
Sophia Dreyfus	706 W. Market Street
Gordon's Millinery	529 So. Fourth Street
Ella M. Grabler	115 So. 26th Street
[fol. 350] Grace & Merit	562 So. Fourth Street
Gross Millinery Co.	226 So. Fourth Street
A. C. Hand	713 So. Fourth Street
Sadie Hilbert	627 So. Shelby
Minnie Holstner	1713 West Market Street
Mae King Shoppe	316 W. Chestnut Street
Lizzie Kummritz	726 W. Market Street
Maude Long	713 West Jefferson Street
Marie Luxemburg	1932 W. Market Street
Marjden Hat Shop	524 So. 4th Street
The Mary Louise	127 W. Oak Street
Anna McGill and Co.	627 So. Fourth Street
Esther Mondry	645 So. Fourth Street
Margaret L. O'Neil	520 W. Breckinridge
Amy Badecker	664 So. 4th Street
Riehlmann's Millinery	1580 Bardstown Road
M. G. Ruwe	310 West Market Street
Eulalia W. Sauermann	2918 Frankfort Avenue
Elizabeth M. Schmidt	1246 So. Shelby Street
Irene Seidell	1609 West Market Street
Pansy L. Seyfert	336 W. Broadway
Shenley's	514 So. 4th Street
Sivori's	138 E. Market Street
E. Strange Co.	247 Starks Bldg.

Chapeau Suzanne	206 Martin Brown Bldg.
Alpha Thixton	400 E. Oak Street
Lois C. Thomas	1045 Bardstown Road
Emma J. Warren	407 W. Broadway
Maggie U. Wobben	1733 W. Market Street
Miss A. Wentzel	1208 So. 3d Street
Wm. Wolf	306 W. Broadway

Two stores located on Fourth Street which, I am advised, are owned by the same merchant have together probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

[fol. 351] Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which I have listed are in the downtown shopping district where they are in continuous active competition with the millinery department of Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times, per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

D. A. Anderson	788 So. Shelby Street
Arch Preserver Shoe Shop	609 So. 4th Street
Baker's Shoe Store	220 So. Fourth Street
Morris Bash	206 So. Preston
A. H. Bass	1705 W. Market Street
A. J. Besendorf	1561 Bardstown Road
V. J. Besendorf	2235 W. Market Street
Boston Shoe Co.	417 So. 4th Street
F. C. Bruch	1257 So. Preston
Cantilever Boot Shop	327 W. Walnut Street
Chandler Boot Shop	460 So. 4th Street
Churney's Shoe Store	1618 Bardstown Road
Dan Cohen	740 E. Market Street
Dan Cohen Co.	229 So. 4th Street

[fol. 352] Nathan Cohen	417 So. 7th Street
Dixie Shoe Store	210 W. Market Street
Donald's	421 W. Walnut Street
Dorothy May Shoe Shop	421 So. 4th Street
Michael Dougherty	622 W. Market Street
Katherine Drescher	919 So. Shelby Street
Adam Eigelbach	1221 So. Shelby
Emerson Shoe Co.	405 So. 4th
Feige's Shoe Store	431 E. Market St.
Feltman & Curme Shoe Stores Co.	321 So. 4th
Forsythe Shoe Corp.	548 So. 4th Street
Jacob Friedman	1460 Dixie Highway
Gekco Co. of Louisville	521 So. 4th Street
Wolf Glazer	1633 W. Market Street
Morris Cross	342 E. Market
Ground Gripper Shoe Store	423 W. Walnut St.
H. & E. Shoe Company	412 So. 4th Street
H. W. Hauenstein	1365 So. 7th Street
John Hauerstein	1478 So. 7th Street
J. B. Hinkebein	802 E. Broadway
Jacob's Shoe Store	207 So. 4th Street
Juvenile Arch Preserver Shoe Shop	1506 Bardstown Road
Kay's	432 W. Market Street
Emma Kircher	1410 Story Avenue
Jos. Markuson	447 So. 7th Street
Michael Shoe Co.	336 W. Market Street
Model Shoe Store	1033 Dixie Highway
J. C. Moffet	915 Baxter Avenue
Robt. Mairin	106 E. Market Street
Nisley Shoe Co.	308 So. 4th Street
Novelty Shoe Store	207 So. 4th Street
Passamaneck's Shoe Store	320 E. Market Street
Novelty Shoe Store	309 So. 4th Street
Potter's Shoe Store	464 So. 5th Street
Samuel Pozitzer	220 So. Preston
Queen Quality Boot Shop	536 So. 4th Street
Harry Rosenberg	1466 Dixie Highway
[fol. 353] The Sample Shoe Store.	621 W. Walnut Street
Isadore Schlossberg	210 So. Preston
Edw. Shaikun	708 W. Market
Shoe Market	424 W. Market
Spalding Shoe Co.	769 Dixie Highway

Sutt & Son	216 E. Market Street
Three Dollar Shoe Shop	336 W. Jefferson Street
Travers Shoe Store	459 So. 7th Street
J. H. Walser & Sons	1276 So. Shelby
Simon Wells	314 E. Market
J. C. Warner	2604 W. Market
White Shoe Store	134 W. Market
C. W. Whitman	3473 Taylor Blvd.
J. Zoll & Son	1136 W. Market Street

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. Compared with this the tax after deductions of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that I know how to make from the sources of information available to me.
[fol. 354] Various specific instances as to other departments occur to me, demonstrating the discrimination against Stewart's, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon my estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1-5th in amount of those made by said company.

Again, our china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years,

conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales [fol. 355] in every instance that I know of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from out- [fol. 356] side the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewart's sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

In nearly all of the cases which I have mentioned the specialized stores competing with one or more of our departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order [fol. 357] houses located in other States who secure by mail and catalogue, orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and make sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Kentucky, it is apparent that their competition is felt only in cities large enough to attract their exhibitions. It is only in the larger cities that there are stores of sufficient size to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which I have made are equally applicable for other years than 1930, and to other lines of trade than those

which I have expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. I know of no reasonable basis upon which the [fol. 358] classification made by the 1930 Sales Tax Law can be justified.

—— ——.

Subscribed and sworn to before me by Robert J. McKim this — day of February, 1931. My commission expires the — day of ——, 19—. —— ——, Notary Public, Jefferson County, Kentucky.

[fol. 359] AFFIDAVIT OF FRED LEVY

STATE OF KENTUCKY,
County of Jefferson, ss:

Affiant, Fred Levy, on oath states:

I am senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western District of Kentucky, at Louisville, being No. 610 on the equity docket.

I am 53 years of age and all my life I have been in touch with the business of Levy Bros., founded by my father and his brothers about 70 years ago and from the beginning conducted in one store at the same location. Having been connected with this firm for over 36 years. After the death of my father and his brothers, I became the senior member of the firm, and in that capacity I have had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling, display of goods, advertising, and the many other questions of vital importance that determine the success or failure of a retail store and especially of a store like that of Levy Bros., handling lines of merchandise in which the taste of the buying public must be trained as well as indulged.

I know the recurring problems of ever-changing conditions and keen competition constantly facing retail mer- [fol. 360] chants in such a business as that of Levy Bros.

I know the value of a good name and a good business reputation in developing and preserving the good-will of a business. My firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, I know that, year by year, we have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of such size that he can handle it at small expense by himself or members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that [fol. 361] branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the 1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of competition with Levy

Bros. Richman Bros. Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store [fol. 362] established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent, when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such discrimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual mer- [fol. 363] chants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros.

Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discriminations against Levy Bros. effected by the 1930 Gross Sales Tax Law.

Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and in the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louis-
[fol. 364] ville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

(2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

[fol. 365] (3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that affiant has no personal knowledge as to the gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

[fol. 366] Subscribed and sworn to before me by Fred Levy this 7th day of February, 1931. My commission expires February 28, 1934. Lillian Nunemacher, Notary Public, Jefferson County, Kentucky. (Seal.)

[fol. 367] AFFIDAVIT OF DANN BYCK

STATE OF KENTUCKY,
County of Jefferson, ss:

Dann Byck, being first duly sworn, makes the following statement under oath:

My name is Dann Byck and I reside in Louisville, Ky. I am President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is the owners do not own or control any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in our store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before [fol. 367½] compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as these competitors must bear a much heavier burden.

I have spent the last 10 years in the employ of Byck Bros. & Co. and I am familiar with the general rules governing the operation of stores carrying on this type of business. In our case we operate on the basis of a small margin of profit.

This is one of the outstanding features of efficient merchandising. Our records show that we make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store of our type. [fol. 368] It can be readily seen that the Kentucky Gross sales tax takes a large percentage of this profit.

This store was established 30 years ago by my father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Our growth is due to the adoption of efficient merchandizing methods and we would be discarding these methods if we attempted to secure a larger profit than we are making. We will have to content ourselves, therefore, with the 1% profit we are making. If we increase our sales the per cent of profit to sale will not increase but the tax would. For example, let us assume that through intense effort and application we are able in 1930 to increase our business an additional one hundred thousand dollars, on which we would earn, figuring on a 1% basis, a net profit of $1,000. Under the confiscatory terms of this tax, $700 of this $1,000 profit would be taken. If, in the course of another year, we gain another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if we are able to reach our goal of $1,000,000 by adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they [fol. 369] would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that sales of this department should be added either to the sales

of all other departments in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by us in Louisville. I am not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of our Louisville store but I am certain that the sales will not be taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and we will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to our sales in Louisville then it increases our sales and places us in a bracket where our tax approaches 1% and as a result this department would be sub-
[fol. 370] jected to a higher tax merely because we operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon us and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell us in their particular line and take away our business without subjecting themselves to the tax. It must be borne in mind that these persons have the same buying facilities that we have. About 95% of them belong to buying organizations and they purchase for their store as much or more than we buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of our department. If we should increase the sales of this particular department or any department the increased sales would be subjected to a tax which would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell us because of the fact that we have to pay a heavy tax not imposed on him. He
[fol. 371] could, therefore, take away all this business and

increase his sales to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if we would make them and only 1/20 of 1% if our competitor would make them.

Louisville, Ky.,
January 15, 1931.

(Signed) Dann C. Byck.

Subscribed and sworn to before me by D. C. Byck this 15th day of January, 1931. Chas. Troxler, N. P., J. C., Ky. My commission expires Jan. 20, 1932. (Seal.)

[fol. 372] AFFIDAVIT OF C. B. TURLEY

STATE OF KENTUCKY,
County of Jefferson, ss:

C. B. Turley, being first duly sworn, makes the following statement under oath:

My name is C. B. Turley and I live in Louisville, Kentucky. I am President of the Kaufman-Straus Company, Incorporated, which operates a Department Store in the City of Louisville. We sell Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Departments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department in this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the max-

imum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who [fol. 373] sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, our Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels us to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing us into the higher bracket. Another example is our Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are [fol. 374] owned by corporations which do not own or operate any other Department in this store. I am informed and believe that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing us in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the Leased Departments would be added to our sales, our tax would be increased by the outside sales. Under either construction, the addition of sales in unre-

lated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. [fol. 375] The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell us and deprive us of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Department Store operates ten Departments, each of which has sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all our business is taxable at a high rate, our competitors could take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

Subscribed and sworn to before me this 24th day of January, 1931. Herbert M. Scott, Notary Public, Jefferson County, Ky. My commission expires July 5, 1933.

[fol. 376] Newport

AFFIDAVIT OF MILTON MARX

STATE OF KENTUCKY,
Campbell County, ss:

Milton Marx, being first duly sworn, makes the following statement under oath:

My name is Milton Marx and I live on Marion Avenue in Cincinnati, Ohio.

I am a member of the partnership of Louis Marx and Brothers. We conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and I have had charge of the Newport store for the last forty years. Because of my experience in business in the city of Newport, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Newport, and I had an opportunity to, and have observed the nature, extent and character of their businesses.

In my opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000.00, but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In my opinion the number of such merchants does not exceed five.

Milton Marx.

Sworn to before me and subscribed in my presence this tenth day of February, 1931. I. V. Guy, Notary Public. My commission expires January 27, 1932. (Seal.)

[fol. 377] AFFIDAVIT OF DANIEL M. COHEN

STATE OF OHIO,
Hamilton County, ss:

Daniel M. Cohen, being first duly sworn, makes the following statement under oath:

My name is Daniel M. Cohen and I live at Cincinnati, Ohio.

I am a Director of The Dan Cohen Shoe Company. This corporation conducts retail stores for the sale of shoes and I have charge of the store operated by it at No. 24 Pike Street, Covington, Kentucky. Because of my experience in business in the City of Covington, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Covington and I have had an opportunity to and have observed the nature, extent and character of their businesses.

In my opinion, and to the best of my knowledge, there are only three stores in the City of Covington which have sales over $400,000.00 in their Covington, Kentucky, stores.

Daniel M. Cohen.

[Duly verified.]

[fol. 378] Paducah

AFFIDAVIT OF H. C. AMSTUTZ

COUNTY OF McCRACKEN,
State of Kentucky:

H. C. Amstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, underwear, and Lingerie.

[fol. 379] D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-Wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

K. Women's Millinery, Men's Hats and caps.

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah, Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lowenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

[fol. 380]

Name and type of store	Estimated sales in excess of
None	$1,000,000
"	900,000
"	800,000
"	700,000
"	600,000
"	500,000
"	400,000

Approximate number below 400,000 as shown by directory.

4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

Rotary Club.
Member of Local Masonic Lodge.
Manager and Wife member of Local Eastern Star.
Entire family liberal contributing members of local Church.
Red Cross.
Member of Municipal Golf Club.
Member of Y. M. C. A. (just recently closed).
Retail Merchants Association.

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set op-osite to their names:

[fol. 381] Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boy Scouts	25.00
Christian Record Publishing Co	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50
Cousin Molly Milk Fund	5.00
Retail Merchants Ass'n (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave National Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of the J. C. Penney Company in a local bank at Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Com-
[fol. 382] pany head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what departments he can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount to approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are op-
[fol. 383] erated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives

a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competitive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily beli-ves.

H. C. Amstutz.

[fols. 384-388] Lexington

AFFIDAVIT OF L. M. ROSS

COUNTY OF FAYETTE,
State of Kentucky.

Mr. L. M. Ross states that he is the manager of the J. C. Penney Company retail dry goods store at Lexington, Kentucky; that he has been a resident of said city for more than three months.

* * * * * * *

[fol. 389] Lexington

AFFIDAVIT OF DOLPH WILE

COUNTY OF FAYETTE,
State of Kentucky, ss.

Dolph Wile, being first duly sworn states:

I am the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. I have been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

By virtue of my employment and experience in the department store business and in the retail dry goods business, I am familiar with the general retail situation in the City of Lexington, Kentucky. I am familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years I have had an opportunity to observe the amount and character of their business. Basing my opinion upon these various factors and my own experiences and general knowledge of the retail trade, and by comparisons with my own store and the sales made therein, I am qualified to estimate the sales made by the particular stores herein mentioned.

I have made a survey of the City of Lexington using the classified telephone directory as a basis for obtaining the [fol. 390] names of the various stores, and in my opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

Name of store		Estimated annual sales
Denton Co.	Department Store	$500,000.00
J. D. Purcell Co.	" "	900,000.00
Brower & Co.	Furniture	400,000.00
Fred Bryant	Automobiles (Chevrolet)	500,000.00
Jess Frazer	Automobiles (Ford)	500,000.00
Graves-Cox & Co.		450,000.00
Wolf-Wile Co.		900,000.00

Basing my opinion as aforesaid I estimate that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

I have read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

Subscribed and sworn to before me by Dolph Wile this 4th day of February, 1931. My commission expires on the 18th day of October, 1934. Hattie Mitchell, Notary Public, Fayette County, Kentucky. (Seal.)

[fols. 391 & 392] Ashland

AFFIDAVIT OF C. H. PARSONS

COUNTY OF BOYD,
State of Kentucky, ss:

C. H. Parsons, being first duly sworn states:

I am the President and chief officer of The Parsons-Faulkner Company of Ashland, Kentucky.

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[fols. 393-397] Bowling Green

AFFIDAVIT OF C. R. LEININGER, BOWLING GREEN, KY.

COUNTY OF WARREN,
State of Kentucky:

C. R. Leininger states that he is the manager of the J. C. Penney Company retail dry goods store at Bowling Green, Kentucky; that he has been a resident of said city for more than one year.

* * * * * * *

[fols. 398-404] Corbin

AFFIDAVIT OF E. R. PROBASCO, CORBIN, KENTUCKY

COUNTY OF WHITLEY,
State of Kentucky:

E. R. Probasco states that he is the Manager of the J. C. Penney Company retail dry goods store at Corbin, Kentucky; that he has been a resident of said city for more than eleven months.

* * * * * * *

[fols. 405-409] Frankfort

AFFIDAVIT OF B. E. VAN ANTWERP

COUNTY OF FRANKLIN,
State of Kentucky, ss:

B. E. Van Antwerp states that he is the manager of the J. C. Penney Company retail dry goods store at Frankfort, Kentucky; that he has been a resident of said city for more than five years.

* * * * * * *

[fols. 410-414] Henderson

AFFIDAVIT OF W. H. HOWELL, HENDERSON, KY.

COUNTY OF HENDERSON,
State of Kentucky:

W. H. Howell states that he is the manager of the J. C. Penney Company retail dry goods store at Henderson, Kentucky; that he has been a resident of said city for more than 1½ years.

* * * * * * *

[fols. 415-419] Hopkinsville

AFFIDAVIT OF E. C. PURVIS, HOPKINSVILLE, KY.

COUNTY OF CHRISTIAN,
State of Kentucky:

E. C. Purvis states that he is the manager of the J. C. Penney Company retail dry goods store at Hopkinsville, Kentucky; that he has been a resident of said city for more than seven years.

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[fols.420-424] Maysville

AFFIDAVIT OF M. S. GESLEY, MAYSVILLE, KY.

COUNTY OF MASON,
State of Kentucky:

M. S. Gesley states that he is the manager of the J. C. Penney Company retail dry goods store at Maysville, Kentucky; that he has been a resident of said city for more than seven years.

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[fols. 425-429] Middlesboro

AFFIDAVIT OF A. C. MILLER, MIDDLESBORO, KY.

COUNTY OF BELL,
State of Kentucky:

A. C. Miller states that he is the manager of the J. C. Penney Company retail dry goods store at Middlesboro, Kentucky; that he has been a resident of said city for more than three years.

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[fols. 430-435] Owensboro

AFFIDAVIT OF O. A. RHODES, OWENSBORO, KY.

COUNTY OF DAVIESS,
State of Kentucky:

O. A. Rhodes states that he is the manager of the J. C. Penney Company retail dry goods store at Owensboro, Kentucky; that he has been a resident of said city for more than 7 years.

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[fols. 436-441] Central City

AFFIDAVIT OF W. T. MORGAN, CENTRAL CITY, KY.

COUNTY OF MUHLENBERG,
State of Kentucky:

W. T. Morgan states that he is the manager of the J. C. Penney Company retail dry goods store at Central City, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 442-447] Georgetown

AFFIDAVIT OF W. G. JENKINS

COUNTY OF SCOTT,
State of Kentucky, ss:

W. G. Jenkins states that he is the manager of the J. C. Penney Company retail dry goods store at Georgetown, Kentucky; that he has been a resident of said city for more than one year.

* * * * * * *

[fols. 448-452] Madisonville

AFFIDAVIT OF ROBERT WRIGHT, MADISONVILLE, KY.

COUNTY OF HOPKINS,
State of Kentucky:

Robert Wright states that he is the manager of the J. C. Penney Company retail dry goods store at Madisonville, Kentucky; that he has been a resident of said city for more than seven months.

* * * * * * *

[fols. 453-458] Mayfield

AFFIDAVIT OF H. H. CRAVEN, MAYFIELD, KENTUCKY

COUNTY OF GRAVES,
State of Kentucky, ss:

H. H. Craven states that he is the manager of the J. C. Penney Company retail dry goods store at Mayfield, Kentucky; that he has been a resident of said city for more than five years.

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[fols. 459-464] Mt. Sterling

AFFIDAVIT OF T. B. JONES, MT. STERLING, KENTUCKY

COUNTY OF MONTGOMERY,
State of Kentucky, ss:

T. B. Jones states that he is the manager of the J. C. Penney Company retail dry goods store at Mt. Sterling, Kentucky; that he has been a resident of said city for more than fifteen years.

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[fols. 465-470] Paris

AFFIDAVIT OF P. O. WOLVERSON, PARIS, KENTUCKY

COUNTY OF BOURBON,
State of Kentucky, ss:

P. O. Wolverson states that he is the manager of the J. C. Penney Company retail dry goods store at Paris, Kentucky; that he has been a resident of said city for more than two years.

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[fols. 471-475] Princeton

AFFIDAVIT OF C. W. GOWIN, PRINCETON, KENTUCKY

COUNTY OF CALDWELL,
State of Kentucky, ss:

C. W. Gowin states that he is the manager of the J. C. Penney Company retail dry goods store at Princeton, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 476-480] Richmond

AFFIDAVIT OF B. E. WILLIS, RICHMOND, KENTUCKY

COUNTY OF MADISON,
State of Kentucky, ss:

B. E. Willis states that he is the manager of the J. C. Penney Company retail dry goods store at Richmond, Kentucky; that he has been a resident of said city for more than four years.

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[fols. 481-486] Winchester

AFFIDAVIT OF J. D. DELANO, WINCHESTER, KENTUCKY

COUNTY OF CLARK,
State of Kentucky, ss:

J. D. Delano states that he is the manager of the J. C. Penney Company retail dry goods store at Winchester, Kentucky; that he has been a resident of said city for more than three years.

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[fols. 487-492] Glasgow

AFFIDAVIT OF J. A. GUDE, GLASGOW, KY.

COUNTY OF BARREN,
State of Kentucky:

J. A. Gude states that he is the manager of the J. C. Penney Company retail dry goods store at Glasgow, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 493-508] Lancaster

AFFIDAVIT OF B. A. AISTROP, LANCASTER, KENTUCKY

COUNTY OF GARRARD,
State of Kentucky:

B. A. Aistrop states that he is the manager of the J. C. Penney Company retail dry goods store at Lancaster, Kentucky; that he has been a resident of said city for more than one year.

* * * * * * *

[fol. 509] AFFIDAVIT OF PAUL H. NYSTROM

STATE OF NEW YORK,
County of New York, ss:

Paul H. Nystrom, being first duly sworn, made the following statement under oath:

I reside in New York and am fifty-three years of age. I am a graduate of the University of Wisconsin and also hold the degrees of Master and of Doctor of Philosophy from the same institution. I am a professor of marketing in the School of Business of Columbia University. The School of Business is a college of equal rank with the colleges of law, medicine, engineering, and others making up the University. As a professor of marketing it is my duty

to conduct courses in marketing including general marketing, retail merchandising, and studies in consumer demand, as well as to guide advanced or graduate students in their research in problems of marketing. In addition to my educational work I also devote considerable time to market analysis for and consultation with private businesses. My clients include manufacturers, wholesalers, and retailers.

My experience began at the age of fifteen as an employee in middle western country general merchandise stores for four years. This was followed by positions as teacher and principal successively in country, village, and city schools for a period of six years. During these years I was constantly employed out of school hours and during vacation [fol. 510] periods in commercial activities. From 1909 to 1914 I was a member of the Faculty of the University of Wisconsin rising in that period to the grade of Assistant Professor of Political Economy. During three successive years, 1906-1908, while in educational work in Wisconsin, I also served as special investigator for the Wisconsin State Tax Commission. During the school year 1914-1915 I served as Associate Professor of Economics in the University of Minnesota. I resigned my position there in the spring of 1915 and took up work as assistant to the president on marketing problems in the U. S. Rubber Company, New York City. In June, 1917, I was appointed director of research and later sales manager of the International Magazine Company, publishers of Cosmopolitan, Good Housekeeping, and four other well-known magazines of national circulation. From January, 1921, down to June, 1927, I was managing director of the Retail Research Association, a co-operative group of eighteen independent department stores with headquarters in New York. On leaving the Retail Research Association in 1927 I was appointed to the Faculty of the School of Business of Columbia University and took up my present activities in education and business consulting.

I am the author of several books including the "Economics of Retailing," first published in 1915, but revised twice since, a book which has served as a standard text in educational institutions and as a practical guide to men in business since it was first issued. Among the other books of which I am the author are the "Economic Principles of Consumption," "Economics of Fashion," "Retail Selling and Store Management," and a pamphlet published by the

[fol. 511] Chamber of Commerce of the U. S. on "Chain Stores." I am also the author of the articles on marketing appearing in the Twelfth, Thirteenth, and Fourteenth editions of the Encyclopedia Britannica. Besides the foregoing I have also written many articles on marketing for periodicals and have lectured frequently before trade and business groups on the same subject.

In the course of my studies on marketing which have been carried on for a period of over twenty years, I have been much interested, both from a practical and theoretical standpoint, in the development of the chain store systems and their effects upon business and upon public welfare in general.

I have read the Kentucky Gross Sales Tax Law and have given careful thought to its effects if permitted to remain in force in that state. The following represent my conclusions concerning the operation of the law.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that [fol. 512] with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales per year in grocery stores and somewhat more than that in drug stores and hardware stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the

same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales [fol. 513] increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering the

goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies [fol. 514] in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced, by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services; the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller, independent retailers are uniting in large numbers for purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net [fol. 515] profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in the regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these new lines of trade earned and are entitled to their growth and success.

[fol. 516] High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Certainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in impor-

tance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated: "After an [fol. 517] extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by myself and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store development and would certainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present develop- [fol. 518] ment of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is attractions of the larger cities that have caused

the trade in smaller towns to decline. The chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities slendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignificant businesses and, while the volume of business done is, of course, not a direct measure of the importance of the retailer in his community it may safely be taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less [fol. 519] than $5,000 or even less than $10,000 a year there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by a constant stream of new beginners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these conditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious

excuse for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away I have no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well [fol. 520] as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good, clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element in this list in which independents cannot by the application of intelligence and energy do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of purchase of goods he can do as well as the chains. There has been a very rapid development in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such cooperative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store systems. Indeed with buying power equalized a great many independent retailers are able, through

[fol. 521] the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and [fol. 522] large where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain stores and the net result of this competition has been and is now enormously advantageous to the consuming public.

Chain store organizations are often criticized for their lack of interests in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores that

they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and independent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

[fol. 523] The Kentucky Gross Sales Tax Law provides for the assessment of a graduated tax against gross sales rather than net sales. Gross sales constitutes an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns and allowances. They run considerably higher in clothing, furniture, floor coverings, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000,000 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of

returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be questioned. If the tax be added to the expenses of operat-
[fol. 524] ing and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

[fol. 525] This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the

tax. Less than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and specialty stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it more profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dispose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been [fol. 526] given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also to the progressive development of the state of Kentucky.

Paul H. Nystrom.

[Duly verified.]

[fol. 527] AFFIDAVIT OF JAMES R. KARIBO

STATE OF KENTUCKY,
County of Jefferson, ss.:

The affiant, James R. Karibo, being duly sworn, states:

I am Manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street in Louisville, Kentucky. I have held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant, on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

[fol. 528] The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the fac simile signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has repeatedly seen it upon the licenses issued to registered pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

Subscribed and sworn to before me by James R. Karibo this 5th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

EXHIBIT 1.

[Kentucky Pharmaceutical Association]

January 16, 1931.

To the Druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a [fol. 529] schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next 100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If your sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and

by taking advantage of your credits the account will balance and you will pay nothing under the new law.

[fol. 530] If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect right to instigate any legislation to take care of the state government expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will [fol. 531] no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky *MUST* subscribe $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum [fol. 532] of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independents interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later.

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

[Envelope]

After 5 days, return to J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.
Liggetts Drug Store, 302 S. 4th Str., Louisville, Ky.

[fol. 533] AFFIDAVIT OF N. A. BASH

STATE OF KENTUCKY,
County of Jefferson, ss:

The affiant, N. A. Bash, being duly sworn, states:

I am District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. I have held my position since September, 1927.

The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it.

I am a registered pharmacist in Kentucky, and by virtue of such registration I am, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

I have read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board [fol. 534] of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Walgreen's, Liggett's, Dow's and Whelan's, the latter being known locally as Taylor Drug Company stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand, and the so-called "independent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have at-

tempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all [fol. 535] pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members, the circular letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

Subscribed and sworn to before me by N. A. Bash this 6th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

[fol. 536] [Title omitted]

NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributor's Association, the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributor's Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

"To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

[fol. 537] 1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next 100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State egislature has a perfect right to instigate any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

[fol. 538] It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the state of Kentucky must subscribe $2.00 in order that the Association may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales

as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoy a volume of less than $60,000 and that for that reason [fol. 539] 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars worth of sales; that there is a breakdown at $249,999, and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference [fol. 540] to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to make certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to

test the law; that he mailed out a bulletin on December 27, 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

[fol. 541] "To Grocery Manufacturers and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed "the 1930 retail sales tax law."

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

While our state law makers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents w-ere engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. If this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional,

but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

[fol. 542] and that he sent out bulletin dated December 9, 1930, to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3, and reads as follows:

December 9, 1930.

"To the Wholesale Trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know, is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1% tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing the Kentucky Food Distributors Association to employ legal counsel, and pro rate the cost among wholesale and retail grocers.

An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must fall on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up our financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

[fol. 543] We must get our money together not later than December 20. Please mail your check for ten dollars at once, and get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4 and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all

sales made by them at retail. The instructions seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quantities and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to [fol. 544] the Cross Sales law.

It is agreed by and between counsel for plaintiff and counsel for the defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Shirley E. Haas taken before Clarence E. Walker, a Notary Public, on February 10, 1931, in Louisville, Kentucky, and introduced in evidence in the above entitled case, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced before the three-judge court.

——— ———, Counsel for Plaintiff. S. H. Brown, Counsel for Defendant.

[fol. 545] AFFIDAVIT OF HENRY F. WALRADT

STATE OF KENTUCKY,
County of Jefferson, ss:

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

HENRY F. WALRADT, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, sitting in practically all of the taxation committees of the Sessions of the General Assembly. I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a mem-
[fol. 546] ber of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identifi-

cation, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State [fol. 547] of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%
Express companies	2%
Telegraph	2%
Electric light and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have

a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the [fol. 548] contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of railroads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

[fol. 549]

	Tax
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact

that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the absolute amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed [fol. 550] that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the amount of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that [fol. 551] in addition to the general property tax some other

form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the case of both taxes the rates increase as the amount of the base—i. e., gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table [fol. 552] has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than

82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky [fol. 553] Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective [fol. 554] rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in

the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due [fol. 555] under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and resulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the conclusion

that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

Henry F. Walradt.

[fol. 556] STATE OF KENTUCKY,
County of Jefferson, Sct.:

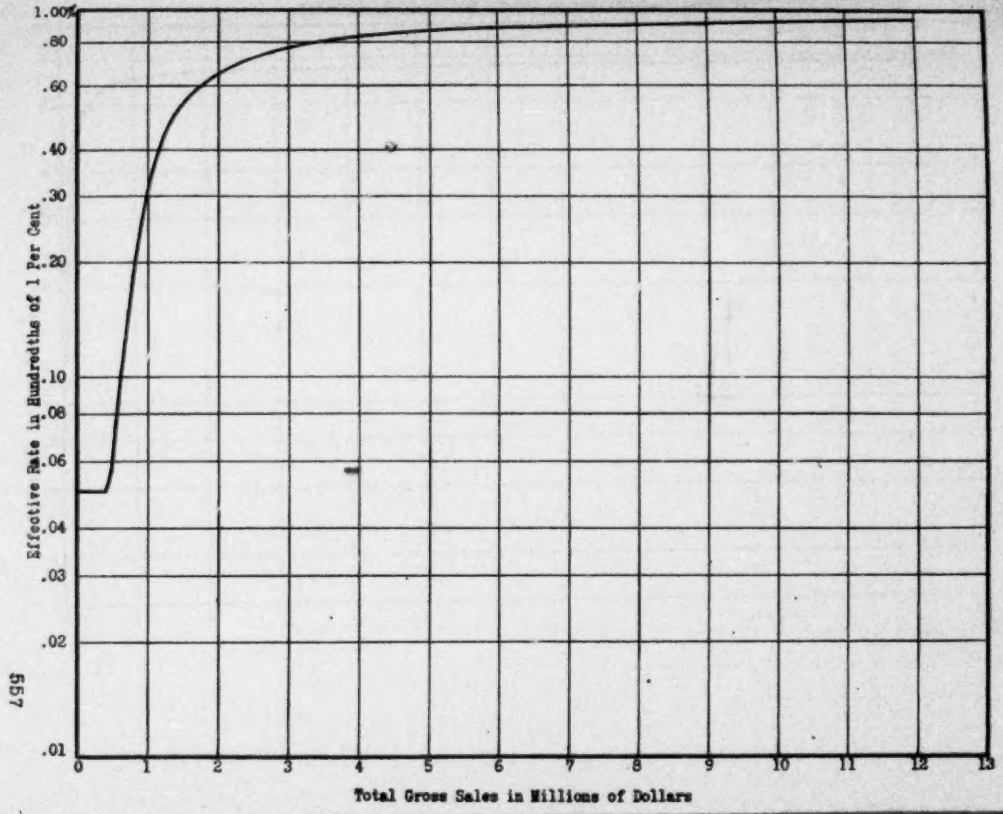
On this the 12 day of February, 1931, personally appeared before me, Henry F. Walradt, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

J. Whitcomb Welch, Notary Public, Jefferson Co., Ky. My Commission expires on the 8 day of Feby., 1934.

(Here follow Exhibits A and B to affidavit of Henry F. Walradt, side folios 557 and 558)

WALRADT—EXHIBIT A.

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX

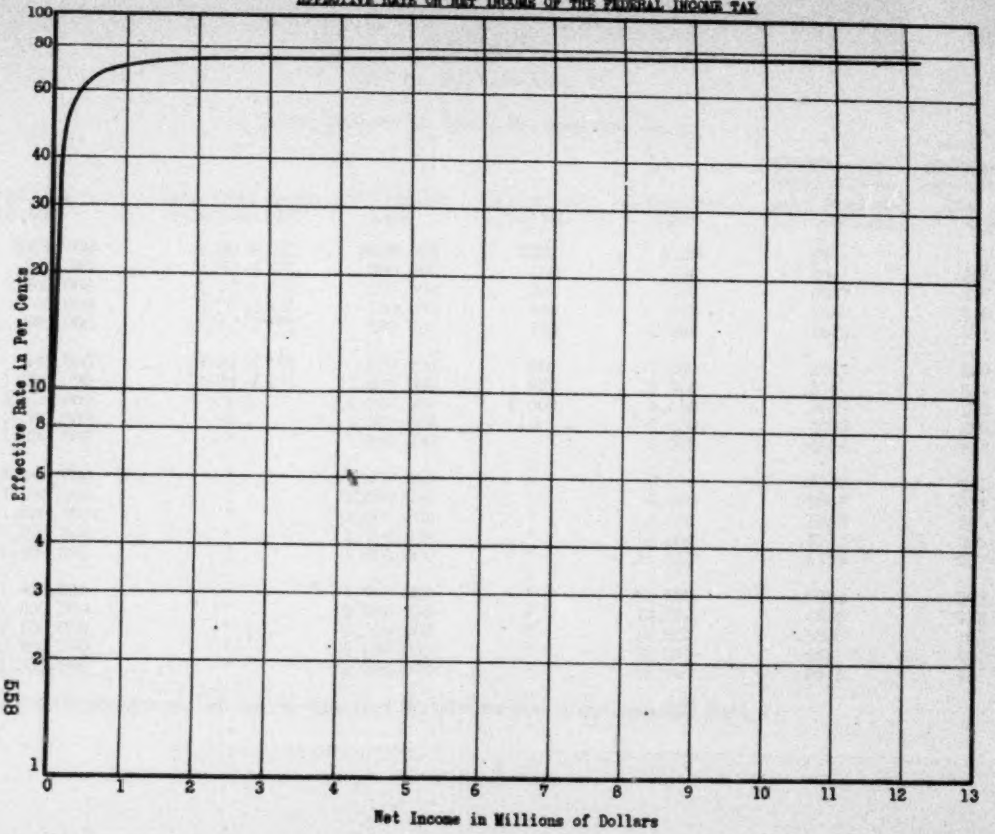


557

312A

WALRADT—EXHIBIT 8.

EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



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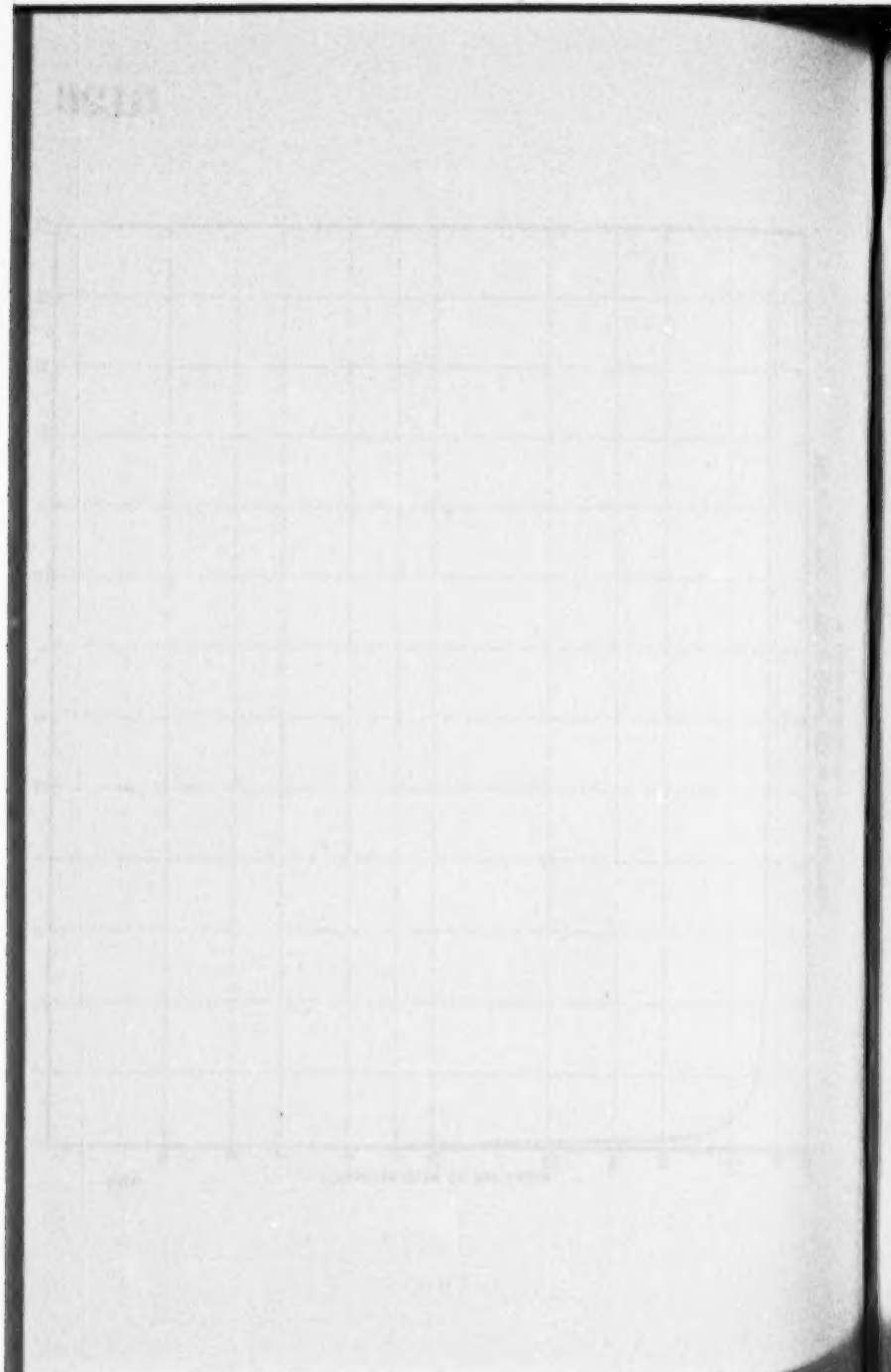
3128



[fol. 559]

[fol. 560]

Appendix

DR. WALRADT—EXHIBIT C

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 561] DR. WALRADT—EXHIBIT C—CONTINUED

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$2,300,000—	2,400,000.....	1%	$2,400,000	$1,000	$17,050	.7104	126/10,000
2,400,000—	2,500,000.....	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000—	2,600,000.....	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000—	2,700,000.....	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000—	2,800,000.....	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000—	2,900,000.....	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000—	3,000,000.....	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000—	3,100,000.....	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000—	3,200,000.....	"	3,200,000	"	25,050	.7828	70,10,000
3,200,000—	3,300,000.....	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000—	3,400,000.....	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000—	3,500,000.....	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000—	3,600,000.....	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000—	3,700,000.....	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000—	3,800,000.....	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000—	3,900,000.....	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000—	4,000,000.....	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000—	4,100,000.....	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000—	4,200,000.....	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000—	4,300,000.....	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000—	4,400,000.....	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000—	4,500,000.....	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000—	4,600,000.....	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000—	4,700,000.....	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000—	4,800,000.....	"	4,800,000	"	41,050	.8552	31/10,000
4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000

5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000
[fol. 562]							
5,300,000—	$5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000
[fol. 563]							
7,800,000—	7,900,000.....	"	7,900,000	"	72,050	.9120	11/10,000
7,900,000—	8,000,000.....	"	8,000,000	"	73,050	.9131	11/10,000

DR. WALRADT—EXHIBIT C—CONTINUED

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$8,000,000— 8,100,000.....	1%	$8,100,000	$1,000	$74,050	.9142	11/10,000
8,100,000— 8,200,000.....	Do.	8,200,000	Do.	75,050	.91524	10/10,000
8,200,000— 8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000— 8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000— 8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000— 8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000— 8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000— 8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000— 8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000— 9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000— 9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000— 9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000— 9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000— 9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000— 9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000— 9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000— 9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000— 9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000— 9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000— 10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000— 10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000— 10,200,000.....	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000— 10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000
10,300,000— 10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000— 10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000

10,500,000— 10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000— 10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000— 10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000

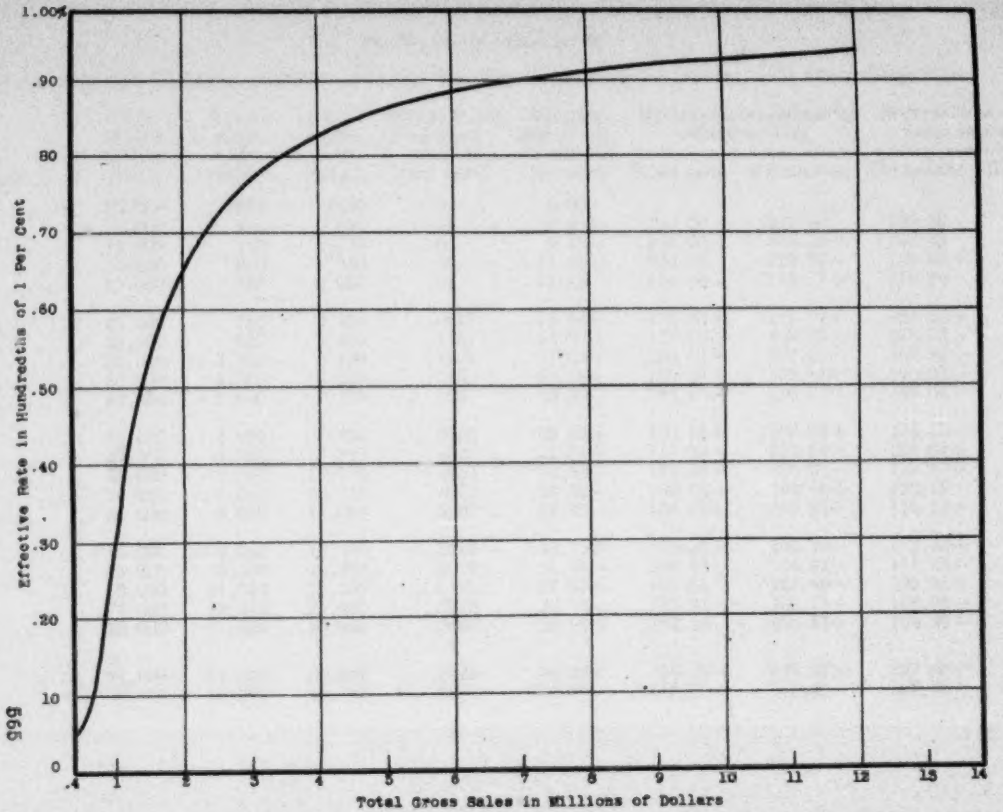
[fol. 564]

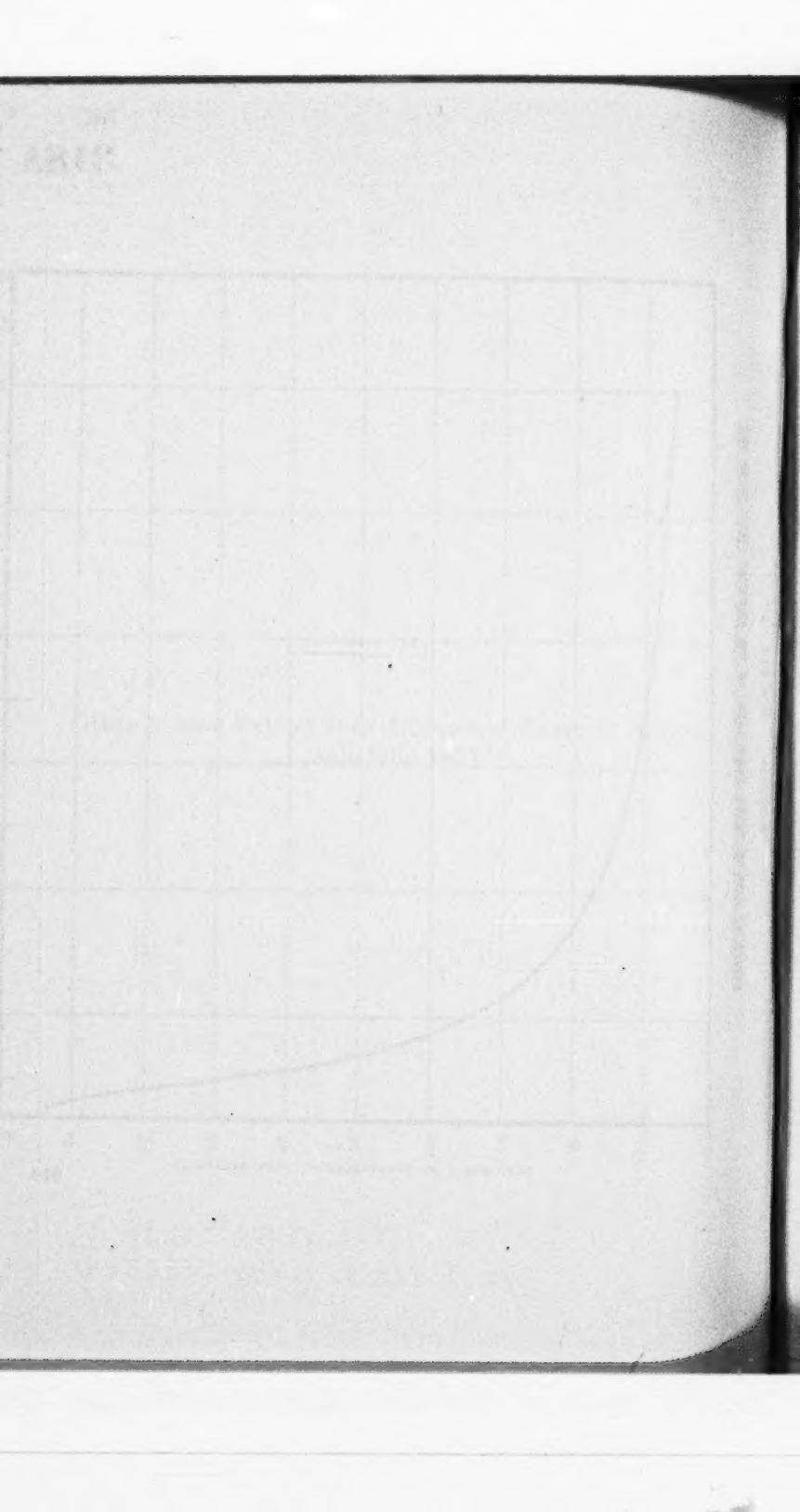
10,800,000—$10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000— 11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000— 11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000— 11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000— 11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000— 11,400,000.....	"	11,400,000	"	107,050	.93904	5,10/000
11,400,000— 11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000— 11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000— 11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000— 11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000— 11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000— 12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows Exhibit D to Affidavit of Henry F. Walradt, side folio 565.)

WALRADT - EXHIBIT "D"

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX





Gross Sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	120.00	113.75+	150.00	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65−	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.72+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	103.88−	109.95+	109.98+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
[fol. 567]									
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

DR. WALRADT—EXHIBIT E—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105.38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

[fol. 568]

DR. WALRADT—EXHIBIT F

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

1,100,000	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000	36,000	5,050	6,550	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000	51,000	10,050	11,390	.5912	22.33+	104.53−	103.76+	111.05−	110.26+
1,800,000	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+
[fol. 569]									
2,100,000	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.97−
2,300,000	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000	93,000	24,050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	105.46+
3,500,000	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

[fol. 570]

DR. WALRADT—EXHIBIT G

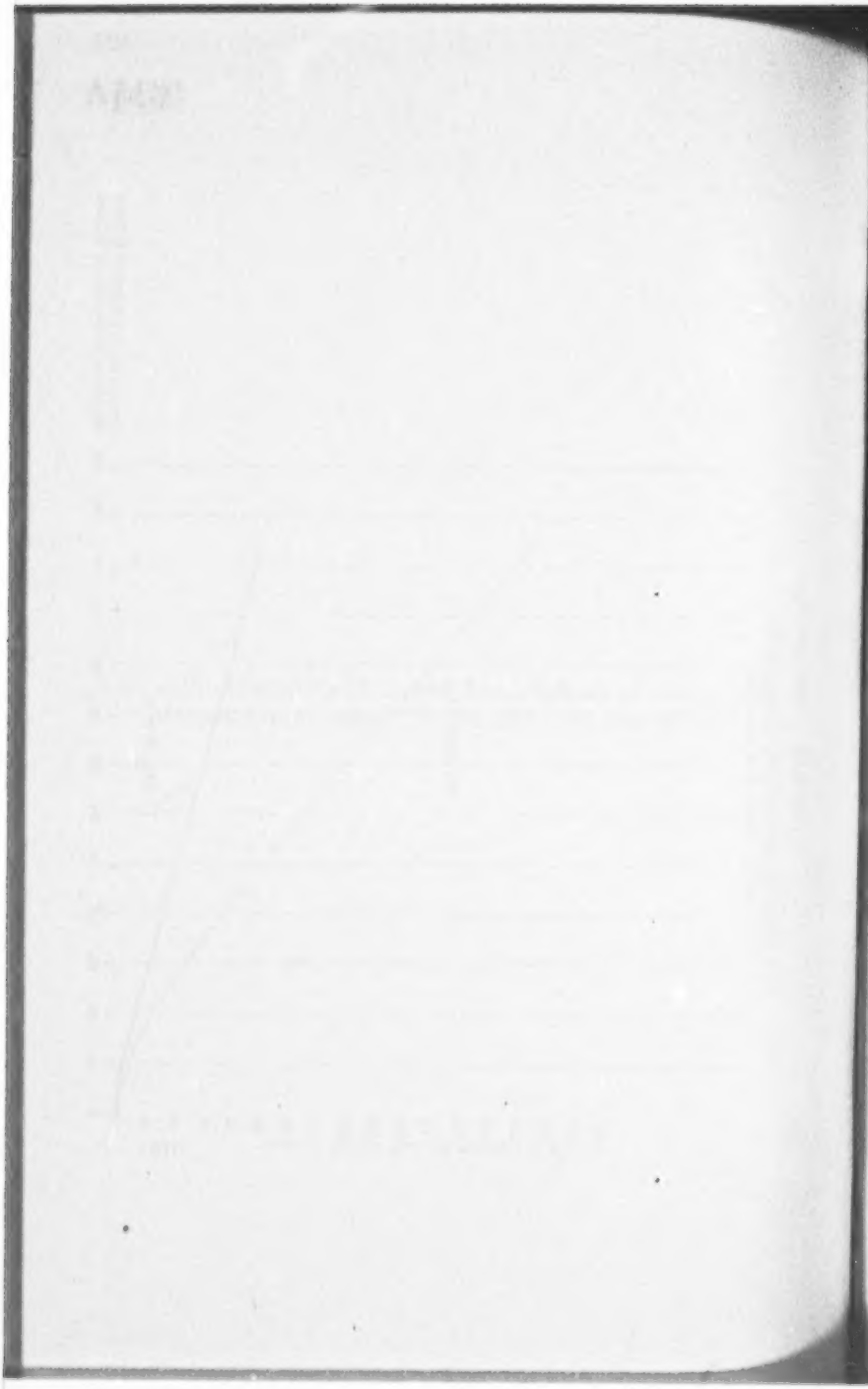
Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65−	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18−	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106.13+	138.64−	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−
[fol. 571]									
2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−

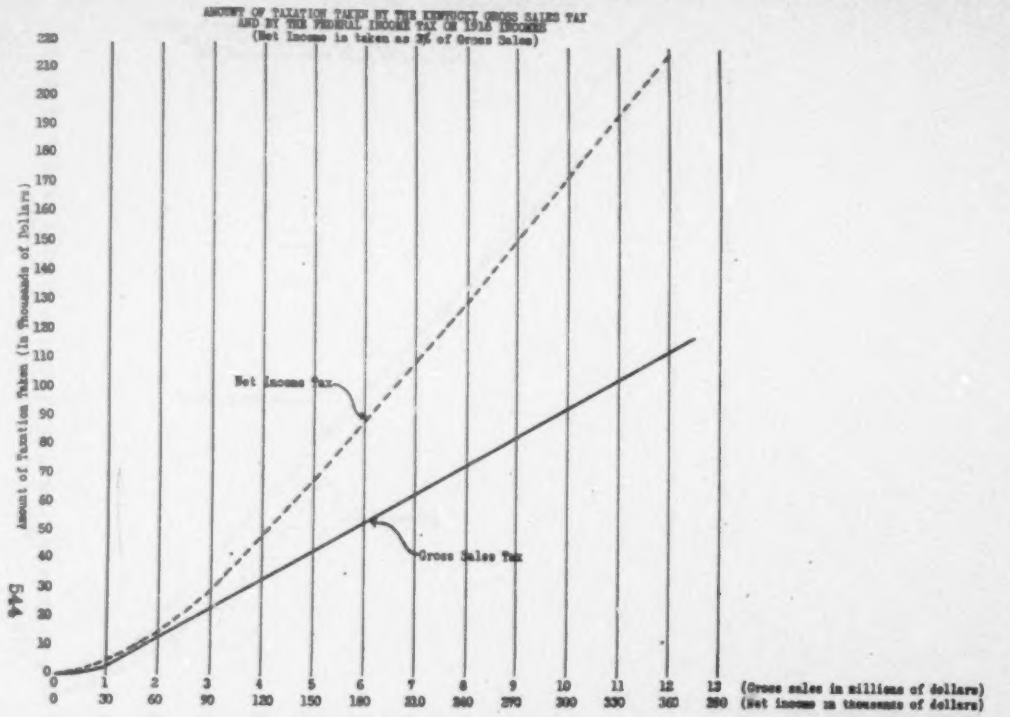
2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−
2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53−
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101.05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−
[fol. 572]									
7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

(Here follow Exhibits H, I, and J to affidavit of Herman F. Walradt, side folios 573, 574, 575, 576, and 577.)

WALRADT - "EXHIBIT "E"
Net Income Tax
Gross Sales Tax
Amount of Taxation Taken (In Thousands of Dollars)
(Gross sales in millions of dollars)
(Net income in thousands of dollars)



WALRADT - EXHIBIT "I"



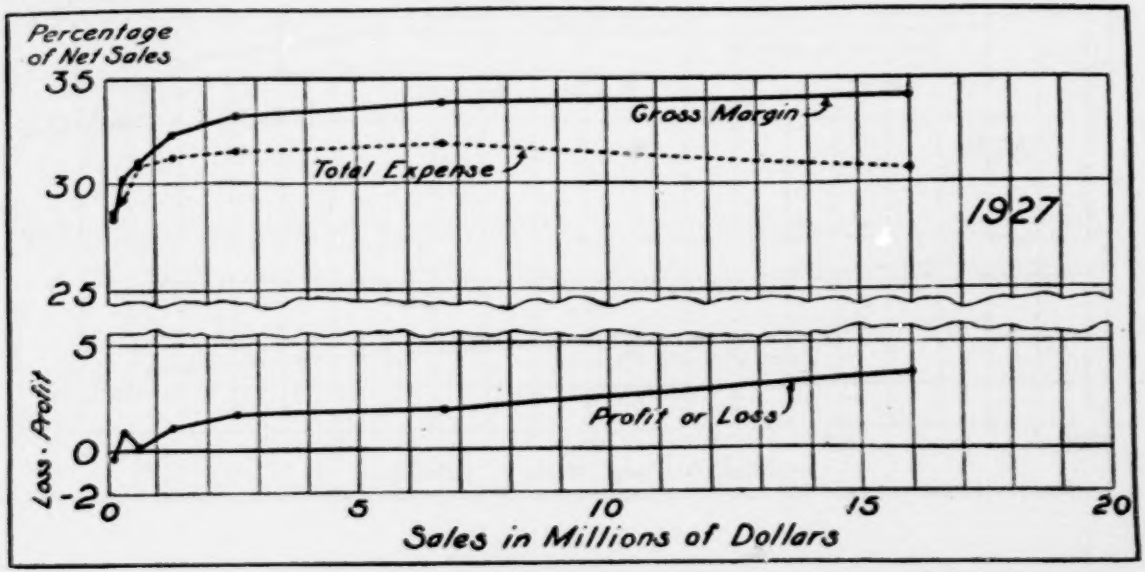
544

3248

Amount of Taxation Taken (in Thousands of Dollars)
Gross Income in Millions of Dollars
Net Income in Thousands of Dollars
Gross Income Tax
Net Income Tax

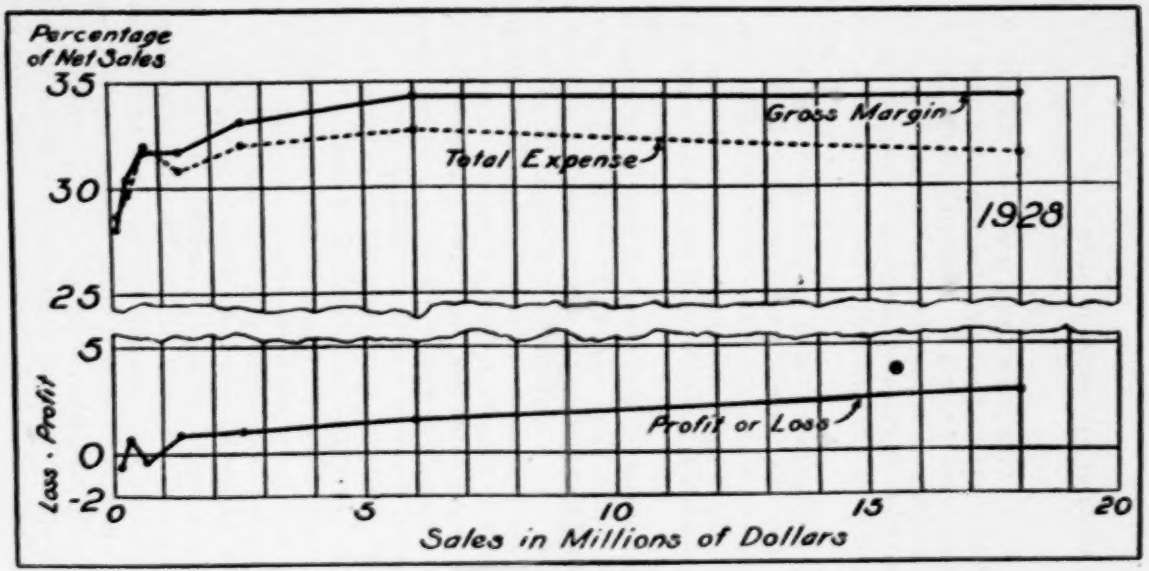
Chart 1. Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927

(Based on 508 Reports)



576
149
3240

Department Stores: 1928
(Based on 413 Reports)



[fol. 578] AFFIDAVIT OF JAMES W. MARTIN

STATE OF KENTUCKY,
County of Franklin, ss:

Affidavit of James W. Martin in opposition to plaintiff's motion for interlocutory decree.

James W. Martin, first being duly sworn, says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Professor of Economics and Director of the Bureau of Business Research in the College of Commerce, and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and, while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Association.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of [fol. 579] the University of Chicago, I was detailed to Washington for investigations in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit corporation engaged in investigating State, local, Federal, and foreign tax systems.

Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, The National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

[fol. 580] I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

[fol. 581] 3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this ques-

tion should throw some light on the economic justification for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statis- [fol. 582] tics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors, which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and

extensive as to be unthinkable, be impugned. In other words, the exhibits below are to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

[fol. 583] I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

[fol. 584] A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers,

whether operating in chains or not, are set forth in the exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold [fol. 585] at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928, and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two

classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

[fol. 586] The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owed capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

[fol. 587] Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there [fol. 588] is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could [fol. 589] be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore,

that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will be correspondingly large. Certain allowance for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appears as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory. [fol. 590] Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of the page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turn-over is a significant fact in retailing efficiency. That mer-

chant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business. Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

[fol. 591] That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turn-over, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of [fol. 592] the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the

larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and [fol. 593] that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 594] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection shoud be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a co-[fol. 595] operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made

to include as many as possible of the principal retailers whose operating results could be determined, whether directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis [fol. 596] in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column in comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that, if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have [fol. 597] presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a de-

cidedly lower rate on owned investment, and the smallest group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, if these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislature, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same [fol. 598] source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Ken-

tucky to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large [fol. 599] number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute [fol. 600] would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, those who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not,

except in rare instances, constitute so severe a burden on merchants as to make it impossible for them to continue in business. Indeed, the scale of rates provided will tend to bring about, but will not completely effect, an equalization of the tax burdens imposed on retail merchants of different sizes.

James W. Martin.

STATE OF KENTUCKY,
County of Franklin, Set.:

On this the 14 day of February, 1931, personally appeared before me, James W. Martin, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

B. T. Brewer, Notary Public, Franklin Co., Ky. My commission expires on the 9 day of Aug., 1931. (Seal of B. T. Brewer, Notary Public, Franklin County, Ky.)

[fol. 601] MARTIN—EXHIBIT No. I

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as shown above		36	2.8%	36	2.1%
Over $1,000,000			28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 602] MARTIN—EXHIBIT No. II

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as shown above		121	2.3%	140	3.0%
250,000– 499,000			69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 603] MARTIN—EXHIBIT No. III

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000- 49,000	69	Loss 0.7
50,000- 99,000	40	1.1
100,000-499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University.

[fol. 604] MARTIN—EXHIBIT No. IV

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as		indicated	
500,000 to 2,000,000	29	11.5	below			
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as		36	8.9%	36	7.0%
Over $1,000,000	indicated above		28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 605] MARTIN—EXHIBIT No. V

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 606] MARTIN—EXHIBIT NO. VI

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (-000 omitted)	II Inventory, Dec. 31 cost (-000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 607] MARTIN—EXHIBIT NO. VII

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	...	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	...	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	...	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	...	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	...	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	...	52,402,610	6,637,912	232	7.89	225,873

[fol. 608]

EXHIBIT NO. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

[fol. 609] EXHIBIT No. VIII TO AFFIDAVIT OF JAMES W. MARTIN

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	1.58	1.00
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	4.41	2.35
S. S. Kresge Co.	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co.	303,047,172	2,422,358	136,397,650	505,615	.80	.37
J. C. Penny Co.	209,690,417	2,164,974	76,955,489	657,300	1.03	.85
Sears Roebuck & Co.	455,360,619	761,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co.	60,628,672	675,623	224,159,596	495,410	1.11	2.05
W. T. Grant Co.	65,448,298	617,436	12,987,760	86,304	.94	.66
J. J. Newberry Co.	27,789,309	451,279	19,020,685	245,620	1.62	1.29
Walgreen Co.	4,680,305	448,953	2,133,774	95,580	9.59	4.48
McCrory Stores Corporation	44,706,253	437,011	37,935,356	213,447	.98	.56
Mangels, Inc.	10,600,006	408,084	2,366,843	28,008	3.85	1.18
Melville Shoe Corp.	25,520,675	377,824	7,029,269	64,357	1.48	.92
S. H. Kress Co.	18,427,479	370,770	9,467,722	88,771	2.01	.94
Schulte United	10,363,432	362,040	16,771,348	205,836	3.49	1.23
G. C. Murphy Co.	15,726,651	297,544	4,457,129	66,358	1.89	1.49
American News Co.	37,021,107	264,160	4,584,269	14,631	.71	.32
Reliable Stores Corp.	14,055,480	248,714	346,911	.....	1.77	....
Jewel Tea Co., Inc.	16,844,110	207,498	7,559,542	8,604	1.23	.11
Edison Brothers Stores, Inc.	3,778,460	204,806	1,536,146	59,941	5.42	3.90
Western Auto Supply Co.	15,959,440	204,658	6,563,989	26,300	1.28	.40
Sterchi Brothers Stores, Inc.	7,870,435	200,617	7,584,514	84,729	2.55	1.12
Childs Co.	24,127,725	165,050	9,433,572	3,009	.68	.03
Lerner Stores Corp.	19,077,143	125,160	4,973,000	7,000	.66	.14

G. R. Kinney Co.	20,961,900	106,230	11,033,337	46,000	.51	.42
D. A. Schulte, Inc.	18,027,784	104,105	25,592,290	14,000	.58	.06
United Cigar Stores Co. of America	69,461,504	89,955	23,665,955	22,385	.13	.10
Feltman & Curme Shoe Store Co.	7,671,145	72,309	2,006,232	10,183	.94	.49
Schiff Co.	5,304,922	71,474	1,636,827	12,706	1.28	.88
B. & G. Sandwich Shops, Inc.	3,404,523	65,476	1,300,932	10,231	1.92	.75
C. F. Adams Co.	3,180,200	51,026	471,002	5,992	1.62	1.25
National Bellas Hess Co.	42,448,047	45,373	8,553,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc.	481,200	41,478	33,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc.	1,148,864	28,925	726,350	9,003	2.98	1.25
Nunn Bush Shoe Co., Inc.	2,755,483	21,792	1,124,225	6,050	.75	.54
Metropolitan Chain Stores	18,065,558	13,200	14,506,000	27,000	.07	.19

* Source: Records of Kentucky State Tax Commission.

[fol. 610] EXHIBIT No. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales, 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 611] EXHIBIT No. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34-35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folios 612 and 613.)

[fol. 612]

MARTIN—EXHIBIT No. XII

Statistics of Large Retail Stores Showing the Effect of Sales Tax

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
	Net sales	Net profit after taxes	Net profit after 1% sales deducted	Net worth	Ratio, II/IV	Ratio, III/IV	Net sales	Profit before gross-sales tax	Profit after gross-sales tax	Net worth	Ratio, VIII/X	Ratio, IX/X
Atlantic and Pacific Tea Co	1053693	26220	15683	118771	22.08%	13.20%	52685	1311	791	5939	22.08%	13.32%
√Sears Roebuck & Co	405372	30058	26013	103441	29.05	25.15	20174	1503	1308	5172	29.05	25.29
√Woolworth, F. W. & Co	303047	35664	32634	158804	22.45	20.55	15152	1783	1639	7940	22.45	20.64
√Kroger Grocery & B. Co	286611	5919	3053	50549	11.74	6.04	14331	296	160	2527	11.74	6.33
√Montgomery Ward	267353	13435	10762	174457	7.70	6.17	13366	672	545	8723	7.70	6.25
√Safeway Stores	213496	6147	4012	37844	16.24	10.60	10675	307	208	1892	16.24	10.99
Penny, J. C. Co	209690	12413	10316	66612	18.63	15.49	10485	621	523	3331	18.63	15.70
√Kresge, S. S. Co. (5 & 10)	156457	14952	13388	83436	17.92	16.05	7823	748	676	4172	17.92	16.21
√American Stores	143346	6595	5161	43144	15.28	11.96	7167	330	265	2157	15.28	12.29
Gimbel Brothers	124636	804	442*	48316	1.66	.91*	6232	40	95*	2416	1.66	3.93*
Federated Department Stores	117003	4856	3686	27227	17.84	13.54	5850	243	191	1361	17.84	14.03
May Department Stores	112724	6175	5048	56161	11.00	8.99	5636	309	259	2808	11.00	9.22
√Hahn Department Stores	112323	4090	2967	43690	9.36	6.79	5616	205	155	2185	9.36	7.09
Drug, Inc	105000	17014	15964	59836	28.43	26.67	5250	851	805	2992	28.43	26.91
√National Tea Co	90201	2731	1829	17633	15.48	10.38	4511	137	98	882	15.48	11.60
McMarr	87238	2174	1301	11860	18.32	10.96	4362	109	72	593	18.32	12.41
√United Cigar Co	84679	2847	2000	72656	3.92	2.75	4234	142	107	3633	3.92	2.95
√First National Stores	75885	2905	2146	10974	26.46	19.55	3794	145	114	549	26.46	20.82
√Kress (S. H.) Co	68474	5521	4836	34785	15.87	13.90	3423	276	249	1739	15.87	14.32
√Grant (W. T.) Co	65902	3058	3299	20497	14.91	11.69	3295	153	127	1025	14.91	12.38
American News	56863	1625	1057	16049	10.13	6.59	2843	81	60	802	10.13	7.48
√City Stores	51695	2051	1534	30219	6.79	5.08	2585	103	84	1511	6.79	5.56
Mercantile Stores	48522	1069	583	16308	6.55	3.57	2426	53	36	815	6.55	4.43
National Bellas Hess	48312	214*	697*	14877	1.44*	4.69*	2416	11*	28*	744	1.44*	3.76*
Walgreen	46623	3130	2664	16034	19.52	16.61	2331	157	140	802	19.52	17.48
McCrory 5c to $1 Stores	44704	2223	1754	23137	9.51	7.58	2235	110	94	1157	9.51	8.18
Schulte Retail Stores	37420	4360	3986	29593	14.70	13.46	1871	218	206	1480	14.70	13.94
Mercantile Securities	42030	243	177*	23435	1.04	.76*	2102	12	2*	1172	1.04	.17*
√Grand Union	36943	1021	6519	6488	15.74	10.05	1847	51	40	324	15.74	12.35
√Daniel Reeves	33767	1128	791	4149	27.19	19.06	1688	56	46	207	27.19	22.22
√Fashion Park	32817	948	620	14302	6.63	4.34	1641	47	38	715	6.63	5.31
F. & W. Grand	30417	1813	1509	12320	14.71	12.24	1521	91	82	616	14.71	13.37
Childs	29952	1277	978	14625	8.73	6.69	1498	64	56	731	8.73	7.66
Bohack	28866	900	612	8914	10.09	6.85	1443	45	38	446	10.09	8.52
√United States Stores	28754	475	187	5756	8.25	3.25	1438	24	17	288	8.25	5.90
Spalding, A. G., Co	27866	2050	1772	20960	9.78	8.44	1393	103	96	1048	9.78	9.12
Newberry, J. J., Co	27789	1594	1316	15056	10.59	8.74	1389	80	73	753	10.59	9.69
√Shattuck	25656	3356	3091	25309	13.26	12.21	1283	168	162	1265	13.26	12.81
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1189	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†

Consolidated Retail Stores	19853	579	381	5302	10.79	7.19	992	29	29	265	10.79	7.26
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†
Hale Bros	18449	310	126	5538	5.59	2.27	922	16	13	277	5.59	4.69
Oppenheim Collins	19854	1561	1363	9793	15.93	13.91	993	78	75	490	15.93	15.31
Kresge Department Store	17070	1391	1221	12064	11.53	10.12	854	69	67	603	11.53	11.11
√Jewel Tea Co	16844	1691	1524	6321	27.14	24.45	842	85	83	312	27.14	26.57
√Waldorf System	16362	1206	1042	6305	19.13	16.52	818	60	59	315	19.13	18.73
Diamond Shoe	16247	1187	1024	5604	21.18	18.27	812	59	58	280	21.18	20.71
Southern Grocery	16092	57*	218*	1471	3.87*	14.81*	805	3*	4*	74	3.87*	5.97*
Western Auto Supply Co	15960	533	373	5358	9.94	6.96	798	27	25	268	9.94	9.32
D. Pender Grocery	15921	288	129	2314	12.44	5.57	796	14	13	116	12.44	11.20
Thompson, John R., Co	15743	1585	1427	10348	15.30	13.79	787	79	78	617	15.30	15.04
Murphy	15726	897	740	6717	13.35	11.01	786	45	43	336	13.35	12.93
√Lane Bryant	17147	633	583	4415	14.33	13.20	780	31	30	221	14.33	13.57
√Peoples Drug	15543	894	738	5222	17.11	14.13	777	45	43	276	17.11	15.57
√Atlas Stores	15176	1154	1002	5614	20.55	17.84	759	58	56	281	20.55	20.10
√Neisner	15092	1025	874	5552	18.46	15.74	755	51	50	278	18.46	18.02
Best & Co	14614	1279	1133	6736	18.93	16.77	731	64	63	338	18.93	18.63
Reliable Stores	14218	1212	1069	7803	15.51	13.69	711	61	60	390	15.51	15.27
[fol. 613]												
National Grocery Co	13791	19	118*	2916	.65	4.04*	689	1	0.5	146	.65	.32
Miller, I. & Sons	13522	830	694	6553	12.66	10.59	678	41	41	328	12.66	12.50
Metropolitan Chain	13513	798	663	7534	10.59	8.78	676	40	39	377	10.59	10.37
Schulte United	12979	23	107*	10935	.21	.98*	649	1	0.3	533	.21	.06
Lobiaw Groceteria	12834	1094	966	4775	22.91	20.25	642	55	53	239	22.91	22.18
√Bauman, Ludwig & Co	11238	623	502	8061	7.73	6.21	562	31	30	403	7.73	7.62
Magnin, I. & Co	10984	706	596	5022	14.05	11.86	549	35	35	251	14.05	13.94
American Department Stores	10823	225	116	3478	6.46	3.33	541	11	11	174	6.47	6.32†
Mangel Stores	10600	229	123	2760	8.26	4.42	530	11	11	138	8.26†	8.02†
Economy Grocery	10561	272	166	1135	23.96	14.59	528	14	13	57	23.96	22.80
Daley's Incorporated	10037	121	28	1302	9.29	2.15	502	6	6	65	9.29	9.23
Happiness Candy	9757	239*	336*	4522	5.28*	7.43*	488	12*	12*	226	5.28*†	5.42*†
Park & Tilford	9348	1001	908	3298	30.36	27.50	467	50	50	165	30.36†	30.20†
Schiff & Co	9199	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	3.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	4.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	21.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	17.45	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frocks	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02

Ross Stores	4498	106	88	2504	4.39	2.31	236	6	6	110	4.39	2.31
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	21.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	17.45	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frock	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02
Edison Brothers	3778	230	192	1441	15.96	13.32	189	12	11	72	15.96	15.96
Nedicks	3567	352	316	2022	17.41	15.63	178	18	17	101	17.41	17.41
Thompson Spa	3552	432	396	4007	10.77	9.85	178	22	21	200	10.77	10.72
B. & G. Sandwich	3405	133	99	897	14.83	11.04	170	7	7	45	14.83	14.83
Consolidated Automatic Merchandise	3116	555*	585*	5339	10.40*	10.96*	156	28*	28*	267	10.40*	10.40*
C. F. Adams	3163	81*	112*	1806	4.49*	6.20*	158	4*	4*	90	4.49*	4.49*
General Vending Corporation	2707	395*	422*	2062	19.16*	20.47*	135	20*	20*	103	19.16*	19.16*
Van de Kamp	2643	158	132	1148	13.76	11.50	132	8	8	57	13.76	13.76
Georgian	2607	120	94	1461	8.21	6.43	130	6	6	73	8.21	8.21
Fair Stores	2547	139	113	1051	13.13	10.75	127	7	7	53	13.13	13.06†
Crown Drug	2358	207	183	1100	18.79	16.63	118	10	10	55	18.79	18.68†
Ground Gripper	2017	129	109	1633	7.90	6.67	101	6	6	82	7.90	7.90
Nunally Co	1775	41	23	1649	2.49	1.39	89	2	2	82	2.49	2.49
Morrison Electric Co	1745	142	125	606	23.43	20.63	87	7	7	30	23.43	20.63†
Kaybee Stores	1582	216	200	890	24.27	22.47	79	11	11	45	24.27	24.27
Kane Stores	1530	159	144	1808	8.79	7.91	76	8	8	90	8.79	8.75†
Marylee Candies	1372	33*	46*	341	9.68*	13.49*	69	2*	2*	17	9.68*	9.68*
Chaffee	1220	39*	52*	486	8.02	10.70*	61	2*	2*	24	8.02*	8.02*
Allison Drug	1140	142	3	688	2.16	.50	57	1	1	34	2.16	2.08†

√ Taken from reports of corporations to stockholders where possible (marked√); otherwise from Moody's *Investment Manual: Industrials*, 1930. Data are for the year 1929 or for the fiscal year falling most largely in 1929.

† Ratio computed from actual figure instead of round numbers.

* Deficit.

Summary Showing Data in Aggregate

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio II/I	VI Ratio III/I	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Ky. gross sales tax at rates provided in statute	X Ratio VII/VI	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio VIII/VI
1,053,693–33,767	30	1,420,982	220,214	174,937	15.50%	12.31%	71,049	11,011	8,873	15.50%	12.31%	12.49%
32,817–15,543	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176– 5,030	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019– 1,140	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 614]

MARTIN—EXHIBIT No. XIII

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	2.8	395,774	261,376	32.67	21.58
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	3,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,480	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co.	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co.	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Mangels, Inc.	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoes	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co.	18,427,479	370,770	9,467,722	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co.	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp.	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co.	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc.	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

MARTIN—EXHIBIT No. XIII—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Western Auto Supply	15,959,440	204,658	6,563,989	26,300	2.32	4,748	4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51
Childs Co.	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc.	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co.	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co.	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	65,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Stores	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

• Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

[fol. 615] **Appeal to XIII**

MARTIN—EXHIBIT No. XIII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co.	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co.	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co.	443,453,000	36,479,000	8.2*
Montgomery Ward & Co.	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co.	.....	.....	6.8c
Walgreen Co.	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc.	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co.	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co.	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp.	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co.	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196b	38,678b	.50b
Schiff & Co.	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. *v.* Ky. Tax Commission *et al.*

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co.	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co.	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co.	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co.	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co.	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co.	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co.	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co.	27,789,369	451,279	15,055,500	243,899	6.8	30,667	30,436	12.58	12.48
Walgreen Co.	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc.	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp.	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co.	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co.	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co.	37,021,107	264,160	16,048,861	113,947	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp.	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co.	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc.	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

Western Auto Supply Co.	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc.	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.	19,077,143	125,160	6,191,136*	40,861	6.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.57d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc.	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.	3,180,260	51,626	1,805,826	29,254	2.34d	1,209d	1,234d	4.13d	4.22d
National Bellas Hess Co.	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc.	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc.	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's Investment Manual: Industrials, 1930.

[fol. 617] MARTIN—EXHIBIT No. XV

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.1	3.5	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade", Harvard Business Review, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	20.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.3	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, op. cit., p. 249.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 618]

MARTIN—EXHIBIT No. XVI

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,000	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. *Childs Co*	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 618½]

MARTIN—EXHIBIT No. XVII (Continued)

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 619] AFFIDAVIT OF CLYDE WILLIAM PHELPS

STATE OF KENTUCKY,

County of Franklin, ss:

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

Clyde William Phelps, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

[fol. 620] I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?

2nd. Is the tax confiscatory?

3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real

justification of a tax as a revenue measure rests fundamentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field [fol. 621] of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 622] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability [fol. 623] to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduated tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penney Company and others make

it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages pos- [fol. 624] sessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four per cent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting chain prices as were certain entirely independent merchants."

[fol. 625] The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, [fol. 626] which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable. Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the

Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers [fol. 627] doing a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

STATE OF KENTUCKY,
County of Franklin, set:

On this the 14th day of February, 1931, personally appeared before me Clyde William Phelps, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

B. T. Brewer, Notary Public, Franklin Co., Ky.
My commission expires on the 9 day of Aug., 1931.
(Seal of B. T Brewer, Notary Public, Franklin Co., Ky.)

[Title omitted]

[fols. 628 & 629] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is thirty-seven years

of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections [fol. 630] of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that [fol. 631] immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and

Corrections has planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky; that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions [fol. 632] for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year

1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to protection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and [fol. 633] that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending

June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been convicted on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; [fol. 634] no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the insane in Kentucky; the Central State Hospital at Lakeland, Kentucky, erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930, was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population

on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31, [fol. 635] 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states [fol. 636] it is the plan of the State Board of Charities and Corrections to establish an institution or colony for

the epileptics of this State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted [fol. 637] of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfac-

tory. He states that the cell block in the Women's Department is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited capacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly..

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect [fol. 638] of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

Affiant further states that architects have been employed by the State Board of Charities and Corrections who have drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

[fol. 639] Further, the affiant saith not.

STATE OF KENTUCKY,
County of Franklin, Set.:

On this the 13th day of February, 1931, personally appeared before me, B. T. Brewer, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

—— ——, Notary Public, —— Co., Ky. My Commission expires on the — day of ——, 193–.

[fol. 640] [Title omitted]

NARRATIVE OF TESTIMONY OF WALTER BURR GIVEN BEFORE ALMA RHEAD FEBRUARY 7, 1931

WALTER BURR testified as follows:

That he has been professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community

Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change is found in the introduction of store dis- [fol. 641] tributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have borne to a considerable extent the responsibility of the conservation and development of community resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where here-

tofore they were on an apprenticeship basis and are now being introduced in high schools under support of federal [fol. 642] funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in increasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy are not actually increasing but that the number of reported cases is larger due to increase in registration.

[fol. 643] Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in

Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of cooperative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owners of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That chain store systems have extended their operation very rapidly in the last few years but that The Great Atlantic & Pacific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed pro-
[fol. 644] duction" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our

economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one or two stores.

[fol. 645] That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these co-operative stores is open to every individual grocery store. That members of the co-operative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain

civic functions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owner- as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some individual merchants support the public schools [fol. 646] and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of committments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that is a member of rural community purchase, including all necessities of life, is distributed through multiple outlet stores.

[fol. 647] That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchases would amount to $540,000.00 per year and assuming that efficiency results in a ten per cent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five per cent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redirect examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either The Great [fols. 648-661] Atlantic & Pacific Tea Company or The Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do

business. That the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testifid but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

It is agreed by and between counsel for the plaintiff and counsel for defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Walter Burr taken before Alma Rhead, a Notary Public, on February 11, 1931 in Cincinnati, Ohio and introduced in evidence in the above entitled cause, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced in the Three-Judge Court.

—— ——, Attorney for Plaintiff. S. H. Brown, Attorney for Defendant.

[fol. 662] In Supreme Court of the United States

Statement of Points to be Relied Upon—Filed April 9, 1932

Comes now the Appellant in the above entitled cause and states that the points upon which it intends to rely in this

Court in this case, are that the United States District Court for the Eastern District of Kentucky erred in the rendition of its interlocutory decree denying plaintiff's motion for an interlocutory injunction in the following particulars set forth under the heading "A" and also erred in the rendition of its final decree sustaining the motion of defendants to dismiss the Bill and thereupon dismissing plaintiff's Bill of Complaint in the following particulars set forth under the heading "B";

"A"

Point 1. In holding that Appellant has any plain, adequate, complete or certain remedy at law available to it in the Federal Courts either under the Challenged Act (Chapter 149, Session Acts of 1930) or any other provision of Kentucky law or otherwise (Assignments of Error 1, 2, 3).

[fol. 663] Point 2. In holding that the Challenged Act authorizes any action at law against the Commonwealth of Kentucky to recover a money judgment in any Court or that by said act or any other provision of law the Commonwealth of Kentucky has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or its representative in any Court of the United States (Assignments of Error 4, 5, 6, 7, 8).

Point 3. In holding that the Federal Courts have jurisdiction of any remedy under Section 10 of the Challenged Act by way of mandamus or otherwise to compel the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the refund of any illegal tax exacted under said act with interest thereon (Assignment of Error 9).

Point 4. In holding that under the facts set forth in the Bill and shown by the evidence, the remedy provided under Section 10 of the Challenged Act to-wit: the refund of illegal taxes by the issue of a warrant restricted by said act to payment out of the general fund of the Commonwealth of Kentucky without other provision for the payment of said warrant and without priority as to other out-

standing warrants previously issued against said fund and without provision for interest thereon at the legal rate, affords the tax payer a complete, adequate, prompt, and certain remedy at law (Assignments of Error 10, 11, 12, 13, 14, 15, 16, 17).

Point 5. In holding that there was no jurisdiction of this suit as a class suit pursuant to Equity Rule No. 38 and the order of the Court made at its inception in order to prevent a multiplicity of actions involved in the claims asserted by plaintiff on its own behalf and on behalf of other retail mechants similarly situated and to prevent a multi- [fol. 664] plicity of actions to recover successive payments of taxes in successive years (Assignments of Error 18, 19, 20).

Point 6. In holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the Challenged Act. (Assignment of Error 21.)

"B"

Point 7. In refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits (Assignment of Error II-1).

Point 8. In declining to consider the issue or the question and in therefore failing to hold that the Challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws for the reasons specifically set forth in Assignment of Error II from two to six inclusive (Assignment- of Error II-2, 3, 4, 5, 6).

Point 9. In declining to consider the issue or question and in therefore failing to hold that the Challenged Act by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation arbitrarily and unreasonable discriminates against the plaintiff and other retail merchants to such an extent that the plaintiff is required to pay twice as much tax on thirteen million dollars of sales as sixteen thousand merchants similarly situated are required to pay upon two hundred and sixty million dollars in sales. (Assignment- of Error II, 2, 3, 4, 5 and 6.)

Point 10. In declining to consider the issue of question and in therefore failing to hold that the Challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky in that said act violates the principles of uniformity in the matter — persons or prop-
[fols. 665 & 666] erty upon a reasonable basis of classification such as is required by the Constitution of Kentucky (Assignment of Error II-7).

Point 11. In declining to consider and in failing to hold that the tax levied by the Challenged Act is confiscatory and deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (Assignment of Error II-9).

Point 12. In declining to consider and in failing to hold that the Challenged Act is a burden on interstate commerce and discriminates against products of States other than Kentucky by imposing a tax on the sale of products moving in interstate commerce and on the sale of farm products grown outside of Kentucky while exempting similar products raised in Kentucky (Assignment- of Error II-10 and 11).

The Kroger Grocery & Baking Company, Appellant,
by Robert S. Marx, Frank E. Wood, Harry Kasfir,
Cincinnati, O.; John C. Doolan, James W. Stites,
Louisville, Ky.

April —, 1932.

Service of a copy of the above list of points to be relied upon by Appellant in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline,
Individually and as Members of the State Tax
Commission of the Commonwealth of Kentucky,
and J. Dan Talbott, Individually and as Auditor
of Public Accounts of the Commonwealth of Ken-
tucky, by Bailey P. Wootton, Atty. Gen.; F. H.
Brown, Asst. Atty. Gen.; H. W. Batson, J. W.
Welch, Leslie W. Morris, Solicitors.

[fol. 667] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF PORTION OF RECORD TO BE PRINTED BY CLERK.

Comes now the Appellant in the above entitled case and states that in its opinion the following portions of the record as filed, are necessary for consideration of the case and need to be printed by the Clerk for the hearing thereof.

1. Bill of Complaint.
2. Application for interlocutory injunction.
3. Motion for temporary restraining order.
4. Order convening three-Judge Court.
5. Temporary restraining order.
6. Order authorizing plaintiff to sue as representative of a class.
7. Entry continuing temporary restraining order in force until hearing.
8. Motion of defendants to dismiss plaintiff's Bill of Complaint.
9. Answer of defendants.
10. Reply of the plaintiff.
11. Order of submission filed February 14, 1931.

[fol. 668] 12. Order listing parties protected by restraining order filed March 28, 1931.

13. Letter of James Martin and A. H. Brendel in regard to gross sales tax report analysis and analysis.

14. Affidavits of the following persons read in support of the application for an interlocutory injunction and the exhibits attached to said affidavits: Arch B. Davis, Robert W. Lyons, John B. Bonham, W. A. Steiden, Gilbert J. Schneider, D. T. Petty, Albert B. Berger, John E. Donahue, John Scanlan, Chris Schumann, Louie J. Jones, Brack M. Ferrill, Albert C. Huneke, Walter Wenderoth, Francis Ballard, Rufus Blume, O. W. Vaughn, John C. Schwartz, Ernest Thompson, M. R. Anderson, C. J. Henry, Harmon [fol. 669] Noe, R. W. Owens, Crawford Lee, C. H. Parker, Robert J. McKim, Fred Levy, Dann Byck, C. B. Turley, Milton Marx, Daniel M. Cohen, H. C. Amstutz, Dolph Wile, Paul H. Nystrom, James R. Karibo, N. A. Bash.

15. Print name of affiants listed hereunder and their connection with J. C. Penney Co. and their residence. Omit printing body of their testimony with explanation that same is omitted in printing for reason that it is similar

in substance and form except as to location name and amounts for the territory in which the affiants reside to the affidavit of H. C. Amstutz for Paducah Kentucky which affidavit is printed in full.

C. H. Parsons, L. M. Ross, C. R. Leininger, E. R. Probasco, B. E. Van Antwerp, W. G. Howell, E. C. Purvis, M. S. Gesley, A. C. Miller, O. A. Rhodes, W. T. Morgan, [fol. 670] W. G. Jenkins, Robert Wright, H. H. Craven, T. B. Jones, P. O. Wolverton, C. W. Gowin, B. E. Willis, J. D. Delano, J. A. Gude, B. A. Aistrop.

16. Narrative of testimony of Shirley E. Haas.

17. All the testimony offered or read on behalf of defendants-appellees as set out in the præcipe (stipulation) filed with the Clerk of the Court below.

18. Opinion of the Court.

19. Order and decree denying interlocutory injunction and dismissing Bill of Complaint.

20. Order substituting J. Dan Talbott as party defendant.

21. Petition for Appeal.

22. Assignment of Error.

23. Order allowing appeal.

24. Stipulation of counsel as to what shall constitute record.

The Kroger Grocery & Baking Company, Appellant, by Robert S. Marx, Frank E. Wood, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors.

[fols. 671 & 672] April 7, 1932.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Bailey P. Wootton, Atty. Gen.; by S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors.

[fol. 673] [File endorsement omitted.]

Endorsed on cover: File No. 36,645. E. Kentucky, D. C. U. S. Term No. 30. Kroger Grocery & Baking Company, appellant, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,645.

FILE COPY

APR 22 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 27

THE STEWART DRY GOODS COMPANY, - *Appellant,*

v.

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND

J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 828.

THE STEWART DRY GOODS COMPANY, - *Appellant,*

versus

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court, this statement is filed as to the basis of this Court's jurisdiction of this cause on appeal.

(a) This suit was brought by appellant against the appellees, public officials of the Commonwealth of Kentucky, to enjoin them from enforcing or executing against appellant, and other taxpayers similarly situated, the provisions of a taxing statute enacted by the

General Assembly at its 1930 session, being Chapter 149 of the Session Acts of 1930, on the ground that such statute is violative of the Federal Constitution and the State Constitution in various respects therein set forth, and therefore void.

Appellant sought and obtained in the court below a restraining order, and pressed to a hearing an application for an interlocutory injunction to restrain the appellees from enforcing said Act.

A statutory court of three Judges was convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code as amended, now Section 380 of Title 28, U. S. Code.

After notice and hearing, as therein required, the court below entered its order denying the motion of appellant for an interlocutory injunction and entered its decree denying a permanent injunction and dismissing the Bill of Complaint, but continued the restraining order in effect pending the hearing of this appeal.

This appeal has been taken from

(1) The decree denying appellant a permanent injunction and dismissing its Bill of Complaint, solely on the ground that appellant has an adequate remedy at law, and

(2) The order denying its application for an interlocutory injunction on the same ground.

By the provisions of Section 266, Judicial Code, now U. S. Code, Title 28, Section 380, and the provisions of Section 238, Judicial Code, now U. S. Code, Title 28, Section 345, a direct appeal to this Court from the

statutory court of three Judges is allowed from that court's order denying after notice and hearing an interlocutory injunction in this case.

In like manner, a direct appeal to this Court is by said sections allowed from the final decree therein denying a permanent injunction and dismissing the Bill of Complaint.

(b) The decree sought to be reviewed herein was entered on December 9, 1931. It is listed as Item 14 in the stipulation of counsel as to what shall constitute the record. The items in said stipulation are inserted in the record in the order set out in said stipulation. As the transcript filed on appeal is partially printed and partially typed it has not been consecutively paged and therefore page references to the transcript can not be made in this statement. Said decree appears at page —— of the printed record.

Application for the appeal was presented and appeal granted March 1, 1932. It is listed as Item 18 in the stipulation aforesaid. Said application for appeal appears at page —— of the printed record.

(c) This suit was brought for the purposes stated above in paragraph (a).

Upon motion made for an interlocutory injunction (Item 4 of the stipulation aforesaid), printed record, page ——, a statutory court of three Judges was duly convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code, as amended, now Section 380 of Title 28, U. S. Code.

By its order and decree, entered December 9, 1931, the said Court denied the motion for an interlocutory injunction and dismissed the Bill of Complaint upon the sole ground that there existed an adequate remedy at law. This decree is listed as Item 14 of the stipulation aforesaid and appears at page —— of the printed record.

(d) Among the many cases believed to sustain the jurisdiction of this Court are:

Stratton v. St. Louis S. W. Ry., 282 U. S. 10.
Ohio Oil Company v. Conway (*Per curiam* Opinion), 279 U. S. 813.
Interstate Busses Corp. v. Blodgett, 276 U. S. 245.
Clark v. Poor, 274 U. S. 554.
Smith v. Wilson, 273 U. S. 388.
Brucker v. Fisher (C. C. A. 6), 49 F. (2d) 759.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

FILE COPY

APR 22 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 28

FRED LEVY, ARNOLD H. LEVY, STUART G. LEVY, JAMES H. LEVY AND S. L. GREENEBAUM, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF LEVY BROS., - *Appellants,*

v.

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND

J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 829.

FRED LEVY, ARNOLD H. LEVY, STUART G. LEVY, JAMES H. LEVY AND S. L. GREENEBAUM, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF LEVY BROS., - *Appellants,*

versus

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court, this statement is filed as to the basis of this Court's jurisdiction of this cause on appeal.

(a) This suit was brought by appellants against the appellees, public officials of the Commonwealth of Kentucky, to enjoin them from enforcing or executing against appellant, and other taxpayers similarly situated, the provisions of a taxing statute enacted by the

General Assembly at its 1930 session, being Chapter 149 of the Session Acts of 1930, on the ground that such statute is violative of the Federal Constitution and the State Constitution in various respects therein set forth, and therefore void.

Appellants sought and obtained in the court below a restraining order, and pressed to a hearing an application for an interlocutory injunction to restrain the appellees from enforcing said Act.

A statutory court of three Judges was convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code as amended, now Section 380 of Title 28, U. S. Code.

After notice and hearing, as therein required, the court below entered its order denying the motion of appellants for an interlocutory injunction and entered its decree denying a permanent injunction and dismissing the Bill of Complaint, but continued the restraining order in effect pending the hearing of this appeal.

This appeal has been taken from

(1) The decree denying appellants a permanent injunction and dismissing their Bill of Complaint, solely on the ground that appellants have an adequate remedy at law, and

(2) The order denying their application for an interlocutory injunction on the same ground.

By the provisions of Section 266, Judicial Code, now U. S. Code, Title 28, Section 380, and the provisions of Section 238, Judicial Code, now U. S. Code, Title 28, Section 345, a direct appeal to this Court from the

statutory court of three Judges is allowed from that court's order denying after notice and hearing an interlocutory injunction in this case.

In like manner, a direct appeal to this Court is by said sections allowed from the final decree therein denying a permanent injunction and dismissing the Bill of Complaint.

(b) The decree sought to be reviewed herein was entered on December 9, 1931. It is listed as Item 14 in the stipulation of counsel as to what shall constitute the record. The items in said stipulation are inserted in the record in the order set out in said stipulation. As the transcript filed on appeal is partially printed and partially typed, it has not been consecutively paged and therefore page references to the transcript can not be made in this statement. Said decree appears at page —— of the printed record.

Application for the appeal was presented and appeal granted March 1, 1932. It is listed as Item 18 in the stipulation aforesaid. Said application for appeal appears at page —— of the printed record.

(c) This suit was brought for the purposes stated above in paragraph (a).

Upon motion made for an interlocutory injunction (Item 4 of the stipulation aforesaid), printed record, page ——, a statutory court of three Judges was duly convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code, as amended, now Section 380 of Title 28, U. S. Code.

By its order and decree, entered December 9, 1931, the said Court denied the motion for an interlocutory injunction and dismissed the Bill of Complaint upon the sole ground that there existed an adequate remedy at law. This decree is listed as Item 14 of the stipulation aforesaid and appears at page —— of the printed record.

(d) Among the many cases believed to sustain the jurisdiction of this Court are:

Stratton v. St. Louis S. W. Ry., 282 U. S. 10.
Ohio Oil Company v. Conway (*Per curiam* Opinion), 279 U. S. 813.
Interstate Busses Corp. v. Blodgett, 276 U. S. 245.
Clark v. Poor, 274 U. S. 554.
Smith v. Wilson, 273 U. S. 388.
Brucker v. Fisher (C. C. A. 6), 49 F. (2d) 759.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

FILE COPY

APR 22 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 29

THE J. C. PENNEY COMPANY, - - *Appellant,*

v.

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND

J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 830.

THE J. C. PENNEY COMPANY, - - *Appellant,*

versus

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court, this statement is filed as to the basis of this Court's jurisdiction of this cause on appeal.

(a) This suit was brought by appellant against the appellees, public officials of the Commonwealth of Kentucky, to enjoin them from enforcing or executing against appellant, and other taxpayers similarly situated, the provisions of a taxing statute enacted by the

General Assembly at its 1930 session, being Chapter 149 of the Session Acts of 1930, on the ground that such statute is violative of the Federal Constitution and the State Constitution in various respects therein set forth, and therefore void.

Appellant sought and obtained in the court below a restraining order, and pressed to a hearing an application for an interlocutory injunction to restrain the appellees from enforcing said Act.

A statutory court of three Judges was convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code as amended, now Section 380 of Title 28, U. S. Code.

After notice and hearing, as therein required, the court below entered its order denying the motion of appellant for an interlocutory injunction and entered its decree denying a permanent injunction and dismissing the Bill of Complaint, but continued the restraining order in effect pending the hearing of this appeal.

This appeal has been taken from

(1) The decree denying appellant a permanent injunction and dismissing its Bill of Complaint, solely on the ground that appellant has an adequate remedy at law, and

(2) The order denying its application for an interlocutory injunction on the same ground.

By the provisions of Section 266, Judicial Code, now U. S. Code, Title 28, Section 380, and the provisions of Section 238, Judicial Code, now U. S. Code, Title 28, Section 345, a direct appeal to this Court from the

statutory court of three Judges is allowed from that court's order denying after notice and hearing an interlocutory injunction in this case.

In like manner, a direct appeal to this Court is by said sections allowed from the final decree therein denying a permanent injunction and dismissing the Bill of Complaint.

(b) The decree sought to be reviewed herein was entered on December 9, 1931. It is listed as Item 14 in the stipulation of counsel as to what shall constitute the record. The items in said stipulation are inserted in the record in the order set out in said stipulation. As the transcript filed on appeal is partially printed and partially typed, it has not been consecutively paged and therefore page references to the transcript can not be made in this statement. Said decree appears at page —— of the printed record.

Application for the appeal was presented and appeal granted March 1, 1932. It is listed as Item 18 in the stipulation aforesaid. Said application for appeal appears at page —— of the printed record.

(c) This suit was brought for the purposes stated above in paragraph (a).

Upon motion made for an interlocutory injunction (Item 4 of the stipulation aforesaid), printed record, page ——, a statutory court of three Judges was duly convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code, as amended, now Section 380 of Title 28, U. S. Code.

By its order and decree, entered December 9, 1931, the said Court denied the motion for an interlocutory injunction and dismissed the Bill of Complaint upon the sole ground that there existed an adequate remedy at law. This decree is listed as Item 14 of the stipulation aforesaid and appears at page —— of the printed record.

(d) Among the many cases believed to sustain the jurisdiction of this Court are:

Stratton v. St. Louis S. W. Ry., 282 U. S. 10.
Ohio Oil Company v. Conway (*Per curiam* Opinion), 279 U. S. 813.
Interstate Busses Corp. v. Blodgett, 276 U. S. 245.
Clark v. Poor, 274 U. S. 554.
Smith v. Wilson, 273 U. S. 388.
Brucker v. Fisher (C. C. A. 6), 49 F. (2d) 759.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

FILE COPY

APR 22 193

CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 30

THE KROGER GROCERY & BAKING COMPANY, *Appellant*,

v.

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND

J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

ROBERT S. MARX, Cincinnati, O.,
FRANK E. WOOD, " "
HARRY KASFIR, " "
JOHN C. DOOLAN, Louisville, Ky.,
JAMES W. STITES, " "
Solicitors for Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 831.

THE KROGER GROCERY & BAKING COMPANY, *Appellant,*

versus

JOHN B. LEWIS, SELDEN R. GLENN AND HENRY M. CLINE, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, AND J. DAN TALBOTT, INDIVIDUALLY AND AS AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, - - - - - *Appellees.*

STATEMENT AS TO BASIS OF JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court, this statement is filed as to the basis of this Court's jurisdiction of this cause on appeal.

(a) This suit was brought by appellant against the appellees, public officials of the Commonwealth of Kentucky, to enjoin them from enforcing or executing against appellant, and other taxpayers similarly situated, the provisions of a taxing statute enacted by the

General Assembly at its 1930 session, being Chapter 149 of the Session Acts of 1930, on the ground that such statute is violative of the Federal Constitution and the State Constitution in various respects therein set forth, and therefore void.

Appellant sought and obtained in the court below a restraining order, and pressed to a hearing an application for an interlocutory injunction to restrain the appellees from enforcing said Act.

A statutory court of three Judges was convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code as amended, now Section 380 of Title 28, U. S. Code.

After notice and hearing, as therein required, the court below entered its order denying the motion of appellant for an interlocutory injunction and entered its decree denying a permanent injunction and dismissing the Bill of Complaint, but continued the restraining order in effect pending the hearing of this appeal.

This appeal has been taken from

(1) The decree denying appellant a permanent injunction and dismissing its Bill of Complaint, solely on the ground that appellant has an adequate remedy at law, and

(2) The order denying its application for an interlocutory injunction on the same ground.

By the provisions of Section 266, Judicial Code, now U. S. Code, Title 28, Section 380, and the provisions of Section 238, Judicial Code, now U. S. Code, Title 28, Section 345, a direct appeal to this Court from the

statutory court of three Judges is allowed from that court's order denying after notice and hearing an interlocutory injunction in this case.

In like manner, a direct appeal to this Court is by said sections allowed from the final decree therein denying a permanent injunction and dismissing the Bill of Complaint.

(b) The decree sought to be reviewed herein was entered on December 10, 1931. It is listed as Item 28 in the stipulation of counsel as to what shall constitute the record. The items in said stipulation are inserted in the record in the order set out in said stipulation. As the transcript filed on appeal is partially printed and partially typed, it has not been consecutively paged and therefore page references to the transcript can not be made in this statement. Said decree appears at page —— of the printed record.

Application for the appeal was presented and appeal granted March 1, 1932. It is listed as Item 23 in the stipulation aforesaid. Said application for appeal appears at page —— of the printed record.

(c) This suit was brought for the purposes stated above in paragraph (a).

Upon motion made for an interlocutory injunction (Item 4 of the stipulation aforesaid), printed record, page ——, a statutory court of three Judges was duly convened to hear said cause and all motions therein, pursuant to the provisions of Section 266, Judicial Code, as amended, now Section 380 of Title 28, U. S. Code.

By its order and decree, entered December 9, 1931, the said Court denied the motion for an interlocutory injunction and dismissed the Bill of Complaint upon the sole ground that there existed an adequate remedy at law. This decree is listed as Item 28 of the stipulation aforesaid and appears at page —— of the printed record.

(d) Among the many cases believed to sustain the jurisdiction of this Court are:

Stratton v. St. Louis S. W. Ry., 282 U. S. 10.
Ohio Oil Company v. Conway (*Per curiam* Opinion), 279 U. S. 813.
Interstate Busses Corp. v. Blodgett, 276 U. S. 245.
Clark v. Poor, 274 U. S. 554.
Smith v. Wilson, 273 U. S. 388.
Brucker v. Fisher (C. C. A. 6), 49 F. (2d) 759.

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OCT 17 1932
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Supreme Court of the United States

OCTOBER TERM, 1932

No. 27

THE STEWART DRY GOODS COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

No. 28

FRED LEVY, ET AL.,

Appellants,

v.

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Appellees.

No. 29

J. C. PENNEY COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

No. 30

KROGER GROCERY & BAKING COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

INTRODUCTORY STATEMENT.

The appellants here were the complainants below and bring this appeal from a decree of the District Court en-

tered December 9, 1931, dismissing the Bills of Complaint filed in four separate equity suits challenging the validity of the Kentucky "Gross Sales Tax Law" (Session Acts, 1930, Chapter 149). The four cases were heard together and were decided by a single opinion in the Court below. The four complainants represent different classes of retail merchants aggrieved by the challenged Act. Each sued on behalf of its class, as shown by the Bill and by the Court's order in each case. The Bills of Complaint filed below sought relief through applications for interlocutory and permanent injunctions against the enforcement of the Act in question, upon the grounds that the enforcement of the Act against the appellants was in violation of the equal protection and due process clauses of the Federal Constitution. In the Stewart and Kroger cases additional grounds are claimed that it imposes a direct burden upon interstate commerce and thus violates the commerce clause.

The statutory court, as provided by law, was convened. Motions for interlocutory injunctions were filed by the appellants. Affidavits and depositions were offered by the appellants and counter-affidavits by the appellees. The appellees filed motions to dismiss upon the ground that the appellants had a plain, adequate and complete remedy at law. The Court below held that the complainants, under Section 10 of the challenged Act, had an adequate remedy at common law, available in the Federal Courts, and upon that ground alone granted the motions to dismiss. The final entries recite:

> "The Court, being of the opinion that there is a plain, adequate and complete remedy at law afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and solely for the reasons stated in its said opinion, sustains the motion of de-

fendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive or other relief prayed for by it." (Stewart R. 245.)

Pending appeal, satisfactory bonds to secure the payment of the estimated taxes for the years 1930 and 1931 were given and the restraining orders issued at the inception of the suits, for the protection of complainants and the classes represented by them, have been continued in force in accordance with approved practice.

These appeals are in this Court to reverse the judgment of the lower Court denying their motions for interlocutory injunctions and dismissing appellants' Bills of Complaint.

Complainants assert rights, privileges and immunities claimed under the Constitution and Laws of the United States. Moreover there is a diversity of citizenship in the Kroger and Penney cases. Hence, Federal jurisdiction has not been questioned. Two main questions are obviously presented:

(1) Are these cases properly cognizable in equity upon any recognized ground of equitable jurisdiction? If so, the decrees of dismissal must be reversed.

(2) If equity jurisdiction be found to exist, should the motions for an interlocutory injunction have been sustained under the evidence adduced, and particularly under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813?

KENTUCKY GROSS SALES TAX ACT.

The challenged Act, printed as an appendix to this brief, also found in each record at page 6 et seq., on its face imposes a tax upon all retail merchants in Kentucky, except "those (merchants) actually engaged in gardening or farming and selling garden or farm products raised by them in this State." Under this provision a retail mer-

chant who operates a farm in Kentucky and sells the produce in his store is not subject to the tax, but a retail merchant who operates a farm out of the state and sells the produce in his Kentucky store has to pay the tax.

The Act by its terms relates to "revenue and taxation" and is an excise or license tax on retail merchants. The tax is laid upon "the opening, establishing, operating or maintaining any store or stores." The amount of tax is determined by computing the tax upon the amount of gross sales. The rate of tax fixed by Section 2 of the Act is not proportional, but arbitrarily and progressively increases with increased gross sales in the following manner:

It starts out with a tax rate of one-twentieth of one per cent on aggregate gross sales of each merchant up to $400,000.00. The rate is then doubled as to the next $100,000.00, and then multiplied by five as to the next $100,000.00, and then multiplied by eight as to the next $100,000.00, and then multiplied by eleven as to the next $100,000.00, and then multiplied by fourteen as to the next $100,000.00, and then multiplied by seventeen as to the next $100,000.00, up to $1,000,000.00 of gross sales, a flat tax of one per cent being levied on aggregate gross sales in excess of $1,000,000.00.

If a retail merchant has more than one place of business, no matter how unrelated the several places of business or the kind of business conducted therein may be, all the sales of all his places of business are combined to determine the gross sales and rate of taxation. From the tax determined under the schedule of rates stated above, the retail merchant is allowed to deduct all special State license, excise, occupational or corporation taxes due under the provisions of any law, which in practical operation and actual effect, as was the intent and design, practically exempts from the payment of any substantial tax, every retail merchant in the State of Kentucky, except the appellants and a few

other large merchants. This statute widely differs from the "chain store tax laws" heretofore considered by this Court, not only in its scope and purpose, but in the scheme and intent of the discriminatory tax thereby levied. These differences are intentional as well as fundamental. (Stewart 5-6.)

Though the Act professes to tax all retail merchants, in actual operation and effect, as shown by the undisputed facts in the record, it exempts those merchants with a small volume of sales and levies a punitive tax upon those with a large volume of sales, thus penalizing a merchant who has large sales, irrespective of profit or loss, and exempting his competitors who have small sales although their ability to pay from the standpoint of capital or profits may be greater. Although the Act professes to tax each dollar of sales, it taxes the sales dollars of a large merchant more than seventeen times as much as the sales dollar of the merchant whose sales do not exceed $400,000.00. This discrimination exists on the face of the Act between competitors selling the same article at the same price, and at the same profit, such as standard makes of shoes, hats, cigars, cigarettes, fountain pens, sugar, flour, etc. However, in actual operation and effect the discrimination is much greater than appears on the face of the Act; in fact, each of the appellants is taxed practically one per cent on every dollar of sales, whereas the dollar of sales of his competitors is practically tax-free, by virtue of the exemptions or credits contained in Section 4, which are sufficient to wipe out the nominal tax levied against merchants whose sales do not exceed $400,000.00. Section 4 also discriminates against merchants doing business as individuals or as members of a partnership in favor of those doing business as a corporation. The tax levied by the challenged Act upon corporations is credited by the amount of an entirely different tax which it pays for the privilege of doing

business in corporate form under the Kentucky Statutes. Thus the operation of Section 4 discriminates against Levy Brothers and the class represented in the action brought by the Levy partnership who receive no like credit.

If the challenged Act is valid, the taxes imposed upon the four appellants alone for the years 1930, 1931 and 1932 are approximately as follows:

The Stewart Dry Goods Company	$71,500.00
Fred Levy, et al.	16,500.00
J. C. Penney Company	35,000.00
The Kroger Grocery & Baking Company	339,150.00

making a tax against the four appellants for the three-year period of $462,150.00.

When we consider that these enormous taxes are not in lieu of, but in addition to, all the other forms of taxation customarily levied, it is apparent that these actions were instituted to enjoin the collection of a very drastic tax imposition, a tax so large that its payments would cause serious financial embarrassment at least, and where the right of recovering back in the event of a payment under protest is extremely uncertain both as to form of procedure and ability to collect within any reasonable period of time.

Section 5 of the Act provides a penalty of 20% of the tax with interest, for failure to file the report when due and provides an additional penalty of 20%, if collected by proceedings in any Court.

Section 6 authorizes the Tax Commission to examine the books, records, papers, files, and equipment of any retail merchant and confers upon it power to examine witnesses under oath to verify the accuracy of any return made. This section also gives to the State the right to have an attachment and garnishment against the property of the taxpayer without the execution of a bond to enforce the collection of the tax.

Section 7 makes any retail merchant guilty of a misdemeanor who shall fail to make report and pay the tax prescribed in the Act, with a penalty of $1,000.00 fine, and, if the merchant is an individual, he may be imprisoned in the county jail for not exceeding six months, or both so fined and imprisoned. It is provided that such penalty shall be in addition to the two 20% penalties provided in Section 5.

Section 9 of this Act provides that one-half of all taxes collected thereunder "shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of said Board." And the other one-half "shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth." The Act contains no provision to segregate or hold any of the taxes collected in order to repay or refund taxes illegally assessed.

Section 10 of the Act is the section under which the Court below held that the appellants had an adequate remedy at law. We therefore quote this section in full:

> "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the

Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

BILLS OF COMPLAINT.

The Stewart Bill for present purposes is typical of them all. It sets out the challenged Act and the grounds of attack upon it, presenting pertinent facts to show the situation of the parties and the designed discrimination effected by the Act in its practical operations. In view of the fact that all the Bills of the four appellants are in substance and in fact the same, we will not refer to the Levy, Penney and Kroger Bills except when necessary to point out some particular feature. The Bill recites that the Stewart Company operates a large department store in Louisville. It has no other store. Its gross sales for the taxable portion of 1930 amounted to $3,209,717.39. The challenged Act levies upon it a so-called license tax of $23,848.06 upon its sales for the year 1930, and approximately $71,500.00 for the years 1930, 1931 and 1932, the taxes accrued to date.

The Levy Bros. Bill sets forth that it conducts in Louisville a single store, selling at retail men's clothing and related articles in various departments. It is a partnership. Its taxable sales for the year 1930 amounted to $1,253,389.07 and the tax exacted of it by the Act is $5,449.28, or a total of approximately $16,500.00 for the three years' taxes now accrued.

The Penney Bill recites that it is a corporation and operates twenty-one stores, retailing dry goods, shoes, clothing, in cities of the third and fourth classes in Kentucky. Its 1930 taxable sales amounted to $1,854,174.03, upon which the Act levies a tax of $11,591.75, less minor

credits, or a tax of approximately $35,000.00 accrued to date.

The Kroger Company Bill recites that it is a corporation, conducting 263 retail grocery stores in cities and towns of Kentucky, principally in the larger cities. Its 1930 sales are approximately Twelve Million Dollars and the tax under the challenged Act amounts for the year 1930 to $113,050.00. The tax under the Act for the three years accrued as to the Kroger Company amounts to approximately $339,150.00.

The four Bills of Complaint set forth four different classes of retail merchants aggrieved by the challenged Act. Each sues on behalf of its class, as shown by the Bill and by the Court's order in each case. They present a fair cross-section of the retail business in Kentucky—especially for comparison with competitors in various cities and towns, who pay no tax, or a trifling amount under the challenged Act. Thus, complainants and numerous others in like situation, many of them named in the record and protected by the restraining order, are taxed at exorbitant rates wholly out of proportion—even when measured by volume of sales—to the taxes levied upon competing stores.

The prayer of each Bill is for an injunction to restrain the collection of the tax levied under the challenged Act for the reason that the enforcement of the same constitutes an infringement of complainant's Federal constitutional rights. The Bills generally set forth important facts, figures and material, relevant to the complaints and the relief sought.

THE EVIDENCE.

Every allegation set forth in the several Bills of Complaint is supported by affidavits and in some instances by depositions. Counter affidavits were filed by the defendants contradicting some issues of fact. However, the main facts

alleged in the bills, and supported by affidavits and depositions, are not disputed of record. By agreement and Court order all the evidence or so much as is pertinent thereto, is filed in each of the cases.

The discriminatory features of the challenged Act are apparent upon the face of the Act itself. In practical operation, however, the vicious nature of the discrimination stands out so boldly as to challenge one's belief that such a taxing statute could be adopted in a land where there were any fundamental rights reserved to the people. Fortunately, we have in the record facts showing the actual operation of the Act. These suits and the temporary restraining order granted by the Court did not interfere with the operation of the challenged Act except insofar as these four appellants and the twenty-five or thirty other parties protected by the restraining order are concerned. With that exception all the merchants in the State of Kentucky coming under the provisions of this Act filed their returns and these returns were available for examination and analysis before the hearing was had in the Court below upon the motions for interlocutory injunctions.

On pages 148 and 149 of the Stewart record (pages 100-102 of the Kroger record) is an analysis prepared by the parties jointly showing the actual operation of the Act, which analysis shows these startling facts. 16,374 retail merchants filed returns. 16,353 of these merchants report sales of less than $400,000.00. The 16,374 returns filed report sales of over Two Hundred and Sixty Million Dollars. Only twenty-one of these merchants have sales in excess of $400,000.00. The 16,374 merchants, because of the minimum rate of 1/20th of 1% coupled with the exemption provided in Section 4 of the Act, only pay a combined tax of $65,656.20, which is an average tax of $4.01 each, or an average tax rate of 1/40th of 1% of the total sales, which brings out the following facts:

1. The Stewart Company is taxed over $23,000.00 upon Three Million Dollars in sales, nearly half as much taxes as are assessed against 16,374 merchants upon sales amounting to Two Hundred and Sixty Million ($260,000,000.00) Dollars.

2. Levy Bros. is required to pay almost $5,500.00 in tax upon One and One-Quarter Million Dollars in sales, while 16,374 other retail merchants with sales aggregating over two hundred times the sales of Levy Bros. are required to pay only $65,000.00 in tax.

3. The Kroger Company with sales of $13,000,000.00 is required to pay a tax of approximately $120,000.00, or twice the combined tax which 16,374 merchants are required to pay on $260,000,000.00 sales. This analysis also shows that 99.8% of the merchants of the State of Kentucky, making about 85% of the total sales, only pay combined one-half of the taxes assessed against the Kroger Company alone.

After the hearing in the Court below, by agreement of the parties, a supplementary tabulation of additional returns filed up to March 7, 1931, was made and attached to the record, which added 791 additional returns to the 16,374 previously referred to, and disclosed an additional tax liability of $4,498.31.

The discrimination shown by the figures included in the analysis of the returns filed, referred to above, is further emphasized if we add the 791 additional returns. The facts in evidence show that, including the tax liability of these appellants and the other merchants similarly situated and protected by the restraining order of the Court below, the total tax collectible under this Act in the year 1930 would not exceed $450,000.00. Of this amount only $70,154.51 would be paid by 17,165 retail merchants who filed returns, leaving about $380,000.00 to be paid by the merchants protected by the Court's restraining order. Nevertheless, these 17,165 merchants having about 85% of the total retail sales

of the State of Kentucky will only pay about 15% of the total tax levied under the challenged Act, whereas, about thirty merchants with total sales of about $48,000,000.00, or 15% of the total retail sales of Kentucky, would be compelled to pay about 85% of the tax under the challenged Act. Of these thirty merchants appellant Kroger, with sales of about 3½% of the total retail sales of Kentucky, would be required to pay over 25% of the total tax levied on all the retail merchants in the State of Kentucky.

We refer to the deposition of Shirley E. Haas, who helped to draw the Act and promoted its passage, when he stated (Stewart Record 95):

> "Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax."

SUMMARY OF ARGUMENT.

When an invalid taxing statute is enacted, there are three methods by which an aggrieved taxpayer may question the validity of the Act.

In the first place, he may refuse to pay the tax and subject himself to such proceedings as the State sees fit to employ in its collection and raise the question of invalidity in answer to the State's action. This is one remedy at law which would be open to appellants, but of which they cannot avail themselves because of the drastic civil and criminal penalties provided in the Act.

In the second place, the taxpayer may pay the tax under protest and bring an action at law to recover the money back on the ground that the Act was invalid. This remedy at law is not open to the appellants for a number of reasons, hereafter stated.

If the two methods at law outlined above are not available to appellants, they have no other remedy except to seek an injunction against the collection of the tax.

Since the Court below dismissed the Bills on the sole ground that the appellants have an adequate remedy at law available to them in the Federal Court and on that ground alone denied the motions for an interlocutory injunction, without considering whether or not the challenged Act, as shown in the Bills of Complaint and evidence submitted in support thereof, violated appellants' rights under the equal protection, due process and commerce clauses of the Constitution, we shall defer discussion of the question of the invalidity of the Act until after we have first presented the question of the right to challenge the Act by a suit in equity for an injunction.

I. APPELLANTS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INTERLOCUTORY INJUNCTION.

(a) Because the Act provides no way by which a taxpayer who has paid under protest, can obtain repayment if the Act is declared invalid. In such event, instead of giving the taxpayer his money back, he is required to take a so-called State warrant on a bankrupt fund out of which no warrant has been paid for over five years.

(b) Kentucky has not consented to be sued at law in the Federal Court.

(c) The only remedy provided in the Act is an action in mandamus against the State Auditor, which the Federal Courts cannot entertain.

(d) Appellants cannot refuse payment of the tax and subject themselves to suit because of the drastic civil and criminal penalties provided in the Act.

(e) The amount of tax assessed under the Act against the appellants is very large, causing serious finan-

cial embarrassment to require its payment. The right to recover back this tax if it should be paid under protest is so uncertain as to leave the appellants without a complete and efficient remedy except in equity.

(f) Appellants are entitled to maintain these actions as class suits under Equity Rule 38.

II. APPELLANTS ARE ENTITLED TO AN INTERLOCUTORY INJUNCTION.

(a) Under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813.

(b) Because the Act denies to appellants equal protection of the law.

(c) The Act violates the commerce clause of the Federal Constitution in that it imposes a tax upon sales of foreign-grown farm products and exempts like products raised in Kentucky, and in that it has directly taxed the sale of products moving in interstate commerce.

(d) The Act is confiscatory and constitutes an attempt to take the property of the appellants without due process of law.

ARGUMENT.

Point I-a.

The Act provides no way by which a taxpayer who has paid under protest can obtain repayment if the Act is declared invalid. In such event, instead of giving the taxpayer his money back he is required to take a so-called State warrant on a bankrupt fund out of which no warrant has been paid for over five years.

It is charged in the Stewart, Levy and Penney Company Bills (Par. 28), that, as shown by an official financial state-

ment issued by the State Treasurer of Kentucky as of January 1st, 1931,

> "The amount of money in the general fund on January 1, 1931, less minor accounts, was $12,565.81, as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds."

It is charged in the Kroger Bill (Kroger Rec. 29):

> "Should the plaintiff . . . . be successful in obtaining a judgment for the recovery of any taxes paid under protest, no provision is made for the payment of said judgment in money, but the remedy of the plaintiff . . . . would be limited . . . . to the issuance of a warrant . . . . on the Treasurer . . . . for the amount of said tax . . . . made payable only out of the General Fund of the State . . . . and . . . . that there are not sufficient funds in the general fund . . . . immediately or within a reasonable time to pay such warrants."

The allegations in the several Bills fully set forth the fact that the "general fund" of the State of Kentucky out of which a refund under this Act can only be obtained is insolvent and that there is no immediate or certain method by which a taxpayer could get a warrant paid even after he had conducted successful litigation to obtain one.

The defendants' motions to dismiss were equivalent to demurrers and as such admitted the truth of the allegations contained in the plaintiffs' Bills of Complaint.

Payne v. *Central P. R. Co.*, 255 U. S. 228, 232, 65 L. Ed. 598, 601;
Hill v. *Wallace*, 259 U. S. 44, 61, 66 L. Ed. 822-827;
National Remedy Co. v. *Hyde*, 50 Fed. (2d) 1066;
Hopkins Fed. Eq. Rules (7th Ed.), p. 198.

The evidence offered by the appellants, wholly uncontroverted by any evidence from the defendants, substantiates in every detail the allegations of the Bill of Complaint in this respect.

Appellants presented the affidavit of Arch B. Davis, Vice President of the Citizens Union National Bank of Louisville, Kentucky, who says (Stewart Rec. 91-92):

> "His experience in dealing with warrants against the General Fund has been that warrants are seldom paid in less than twenty months from the time when they are stamped 'Interest-bearing,' and he estimates that the *average time* within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included general warrants stamped interest-bearing on June 11, 1927, which would indicate that no warrants against the General Fund stamped since that date have been paid."

That the general fund of the State of Kentucky is insolvent at the present time; that it has been insolvent for a great many years; and that it will continue to be insolvent for many years in the future is a matter of common public knowledge in the State of Kentucky, and is evidenced by legislative declaration, judicial opinion and official messages of high public officers.

This Court has held in numerous cases that it will take judicial notice of public records and decisions of the courts, public acts of the Legislature (even when passed pending appeal), and reports of the Legislative committees, public commissions, and other public officers as to public matters affecting the State, even though the fact be otherwise pleaded without contradiction:

> *Abie State Bank* v. *Bryan*, 282 U. S. 765-778;
> *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158-164;

Jones v. *U. S.*, 137 U. S. 202-214-215-216;
Fourth Nat. Bank v. *Francklyn*, 120 U. S. 747-751;
Lamar v. *Micou*, 114 U. S. 218-223;
Muller v. *Oregon*, 208 U. S. 412-421.

The public records of Kentucky leave no doubt as to the long standing insolvency of the "general fund." The Legislature knows it and has so stated; the Governor knows it to be a fact, because he approved an Act of the Legislature admitting it. The Court of Appeals of Kentucky knows it, for it is set forth in their opinions. The voters of the State of Kentucky know that this fund is insolvent because time and again they have refused in referendum elections to provide for the payment of the public debt so as to make this fund solvent. The State Tax Commission, defendants in these actions, know that this fund is insolvent and that warrants drawn upon it cannot be paid within any reasonable time because they testified in a recent case that warrants were selling at a discount. See *State Budget Commission* v. *Lebus*, 244 Ky. 700.

In 1924 there were outstanding warrants against the Commonwealth of Kentucky amounting to Six Million Dollars, and in that year the Legislature of Kentucky adopted an Act to issue bonds in that sum, "to pay the outstanding warrants of the Commonwealth." A referendum was held on this bond issue and it was defeated at the election. This is a legislative recognition of the insolvent condition of the "general fund." See Acts of 1924, Ch. 122, pp. 436-444.

Again in 1926, the Legislature passed an Act providing for the issuance of bonds for the purpose of paying the outstanding warrants of the Commonwealth, which was likewise defeated on a referendum. See Acts of 1926, Ch. 13, pp. 85-89.

The Legislature of the State of Kentucky, in 1932, again undertook to discharge the public debt and retire the un-

paid warrants of the State by an issue of bonds, by an emergency act to take effect without a vote of the people, and in this Act admits that no State warrant has been paid since July 5, 1927; admits that "there is no money in the Treasury . . . . to pay the indebtedness evidenced by said warrants, or any part thereof," and admits that there is "now no provision of law to enable persons holding State warrants to obtain payment thereof." We refer to Acts of 1932, Ch. 20, pp. 119-123.

This Act is entitled:

> "AN ACT authorizing the funding of certain indebtedness of the Commonwealth of Kentucky, *which is evidenced by outstanding state warrants,* by the issuing of funding bonds, and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby," etc.

This Act contains a lengthy preamble reciting:

> "WHEREAS, There are now outstanding state warrants of the Commonwealth of Kentucky beginning with Warrant Number A49, dated July 5, 1927, and including all *unpaid* interest bearing warrants *issued since said date,* excluding warrants against the State Road Fund, which were duly and regularly issued by the Auditor of Public Accounts and stamped 'Interest bearing' by the State Treasurer, ... *and which warrants are now outstanding* and the indebtedness evidenced thereby unpaid, together with the interest accrued thereon at five (5%) per cent per annum from the respective dates of stamping thereof, less interest payments which have been made thereon; and
>
> "WHEREAS, *There is no money in the state treasury,* after reserving a sum sufficient to pay the necessary operating expenses of the Commonwealth for the remainder of the *current* fiscal year, *to pay the indebtedness evidenced by said warrants, or any part thereof;* and

"WHEREAS, Property values have greatly depreciated, thereby reducing the revenues and anticipated revenues of the Commonwealth; and

"WHEREAS, It is deemed by the General Assembly to be for the best interest of the Commonwealth that its budgets be balanced, and that the current revenues of each fiscal year applied to the payment of current expenses of the fiscal year; and

"WHEREAS, *Some of said warrants have been issued and outstanding for approximately 5 years;* and

"WHEREAS, It is deemed by the General Assembly to be necessary and advisable that the indebtedness of the Commonwealth evidenced by said warrants be funded by the issuance of bonds of the Commonwealth of Kentucky maturing serially over a period of twenty years, *in order that said indebtedness may be paid* without *unduly burdening* the taxpayers or *impairing the credit* of the Commonwealth and without *unnecessarily limiting* the ability of the Commonwealth to maintain its ordinary and necessary governmental functions, and so as to make it possible and practicable that hereafter all expenses and obligations of the Commonwealth may be paid from current funds during the fiscal year in which created, thereby obtaining services, materials, and supplies for the ordinary and necessary governmental functions of the Commonwealth of Kentucky on the most favorable terms. Now, therefore,"

Following this preamble is an enactment in six sections, the purpose of which is to acknowledge the indebtedness evidenced by the warrants and to fund same in the form of bonds payable in installments of not more than one million dollars annually prior to 1948, and not more than two million dollars annually from 1948 to 1952, inclusive.

Section 1 provides, at its end (p. 122):

"The proceeds of the sale or sales of such bonds shall be paid into the state treasury into a special fund and held in trust *for the sole purpose* of paying the indebtedness evidenced by said warrants."

Section 2 levies an annual tax in amounts sufficient to pay the interest and principal to become due in each fiscal year, for the sole purpose of paying such principal and interest on account of said bonds.

Section 6 provides as follows:

> "For the reasons set forth in the preambles hereof and for the further reason that *there is now no provision of law to enable persons holding state warrants to obtain payment thereof* an emergency hereby is declared to exist and this act shall take effect immediately upon its passage and approval by the Governor."

This Act in its entirety was held unconstitutional by the Court of Appeals in *State Budget Commission, et al.*, v. *Lebus, et al.*, 244 Ky. 701-714, on the ground that the Act violates the constitution forbidding the State to contract debts in excess of $500,000 without submitting the question to the vote of the people. The Court of Appeals in this opinion admits that in January, 1932, there were more than Thirteen Million Dollars of unpaid warrants outstanding. We quote from the opinion of the Court of Appeals as follows:

> "When the General Assembly convened on the first Tuesday in January, 1932, *there were in existence auditor's warrants*, indorsed by the state treasurer as interest bearing, aggregating more than $13,000,000. By Senate Bill No. 454, adopted by the General Assembly at its 1932 session, and approved by the Governor, these warrants were recognized as debts of the commonwealth, and their payment was provided for by the issuance and sale of bonds by the State Budget Commission, to the amount of $14,000,000." (P. 703.)
>
> "It cannot be assumed, however, that the owners of the warrants at the time they surrendered their respective claims against the commonwealth and accepted, in lieu of them, the warrants, anticipated they

would be coerced *to retain them indefinitely* because of the failure or refusal of the Legislature, year after year, to provide funds for their payment. *It cannot be doubted that such nonaction of the Legislature is in a sense a degree of repudiation.*" (P. 710.)

"Lastly, it is insisted that without the issuance and sale of bonds as provided for by Senate Bill 454, *the outstanding auditor's warrants will depreciate in value, the credit of the state will be unduly affected, and the expenses of the state government cannot be defrayed.* This argument with propriety might be addressed to the Legislature, but with the court it is not to be considered. We are deciding a question of *power* only." (P. 714.)

It thus appears, since these cases were submitted on February 14, 1931, the deficiency in the General Fund has increased from approximately $10,000,000 to $14,000,000. The Legislature and the Governor in the 1932 Bond Act *so stated* and further declared the State can with difficulty find revenues sufficient merely to carry on its ordinary governmental operations or to prevent even greater impairment of its financial credit. It has no present hope of reducing its outstanding warrants.

The record in the case of *State Budget Commission* v. *Lebus, supra,* contains the depositions of two of the defendants in these cases, who are members of the State Tax Commission. One of the defendants, Selden R. Glenn, testifying under examination by the Assistant Attorney General who is conducting the defense of this case, states that "the warrants on the market today are worth 87c to 88c," and that there is not a ready market for them at any price, and further, that "if something isn't done to relieve the situation, the warrants before September will sell at 75c."

In the light of the allegations in the Bills of Complaint fully supported by evidence, with reference to the warrants issued on the public funds, and the state of the "general

fund," let us examine Section Ten of the challenged Act and see if the remedy therein provided for a taxpayer who has paid under protest is as "certain, complete, prompt, practical and efficient to attain the ends of justice as that in equity." If not, equity jurisdiction exists under the facts shown in this record.

C. B. & Q. R. R. Co. v. *Osborne*, 265 U. S. 14-16;
Risty v. *C. R. I. & P. Ry. Co.*, 270 U. S. 378-388;
Henrietta Mills v. *Rutherford*, 281 U. S. 121-126.

Section Ten does not give to a taxpayer a right to get his money back. It says that he may "*at any time within two years from the date of such payment, sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment.*"

Does he get his money back if he wins the suit? No. Section 10 says:

> "If it is *finally* determined that the tax was wrongfully collected, it shall be the *duty* of the auditor to issue his warrant on the Treasurer."

Does he get his money back if he wins the suit and gets the warrant on the Treasurer? No. Section 10 directs that the Treasurer pay the warrant out of the "*General Fund.*" The General Fund, as we have seen, is bankrupt. What can the taxpayer do with these warrants? To use the language of the Court of Appeals they are "*coerced to retain them indefinitely,*" which again using that Court's words, "is in a sense a degree of repudiation."

Section Ten does not give to a taxpayer any greater or different right than what he had under the general laws of Kentucky. Under Section 162, Kentucky Statutes, it is provided that:

> "When it shall appear to the Auditor that money has been paid into the Treasury for taxes when no

> such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

It is therefore submitted that without Section Ten, the Auditor not only has the authority but that it is his duty to issue a warrant for the payment of taxes illegally collected. It is also well settled in Kentucky that if the Auditor refuses to issue a warrant, repaying taxes illegally collected, the taxpayer's only remedy is by way of an action at law in mandamus to compel him to perform his duty by drawing the warrant and this is true under Section 162 of the Kentucky Statutes, or under Section Ten of the challenged Act. *Coleman, Auditor,* v. *Consolidated Realty Co.*, 239 Ky. 788.

The taxpayer is a long way from getting his money back when he gets a warrant issued by the Auditor. But when he gets the warrant issued by the Auditor, the remedy provided for him in Section Ten is at an end for the reason that, notwithstanding the fact that Section Ten provides the Treasurer shall pay such warrant out of the "general fund" of the State, under the general laws of Kentucky, the State Treasurer is not bound to issue his check or to pay the warrant unless there is money in the particular fund upon which it is drawn, available for its payment according to law. The State Treasurer is strictly limited in his power to draw a check upon State funds by Section 4688, Kentucky Statutes, which provides:

> " . . . . and no such check shall be given by the Treasurer even though the Auditor issues a warrant therefor, unless the law under which the money may be claimed expressly directs and orders that it shall be paid out of the public treasury."

Section Ten specifically designates that the Treasurer shall pay the warrants out of the "general fund" of the

State. If the money is not in the "general fund," the Treasurer cannot be made to pay it, and the courts cannot, by mandamus, or any other way, compel him to pay it, as was held in *Bosworth, State Treasurer*, v. *Shuck*, 118 Ky. 458.

Section 4688a-1, Kentucky Statutes, provides that the Treasurer shall receive and redeem warrants issued by the Auditor,

> " . . . . if there be sufficient money in the treasury *appropriated for that purpose.*"

Section 4688a-2 provides:

> "That when Auditor's warrants are presented to the Treasurer for redemption . . . . and the funds *appropriated for the purpose* for which the said warrant was issued *are exhausted*, the Treasurer shall endorse thereon the date of its presentation, with the words 'No funds with which to pay this warrant, and it bears 5 per cent. interest from this date until called in.' "

Section 4688a-4, Kentucky Statutes, provides:

> "The Treasurer may, whenever there are funds in his hands amounting to as much as fifty thousand dollars ($50,000.00), *subject to the payment of outstanding warrants*, call for such number of warrants *by serial number*, which, in the aggregate, *do not exceed the amount of money on hand*, for the purpose of redeeming them. . . . The call of the Treasurer shall be published by him for ten consecutive days in a daily newspaper published in this state, and no warrant so called in shall bear interest after the expiration of said ten days' publication. Nothing herein, however, shall prevent the payment by the treasurer of said warrants due *according to the date of issue*, if presented without awaiting such publication."

These statutes are construed by the Court of Appeals and the Attorney General (Opinions of the Attorney Gen-

eral—1928 Compilation, p. 466) as requiring the Treasurer to pay the warrants according to their serial numbers and dates of issue.

Rhea, Treasurer, v. *Newman*, 153 Ky. 604, 618.

In this case, the Court construed the statutes above cited, governing the Treasurer in the payment of warrants drawn upon him by the Auditor of Public Accounts, and said (p. 618):

> "It is the duty of the Treasurer to pay outstanding warrants *in the order they were issued*, and as money available for the purpose reaches the treasury. This practice *insures fair treatment* of all, alike."
>
> (Reaffirmed in *Bosworth* v. *State University*, 154 Ky. 370-373.)

The above cited case of *Bosworth, State Treasurer*, v. *Shuck*, illustrates just what kind of adequate remedy at law appellants would have under Section Ten of the challenged Act. Shuck was a State employe. There was due him $1,875.00 unpaid salary. The Auditor refused to issue a warrant to Shuck because the funds for the payment of his salary were exhausted. Shuck thereupon brought suit against the Auditor under Kentucky Statute Section 162 in mandamus to compel the Auditor to draw a warrant on the State Treasurer. Shuck won this law suit. The Auditor was compelled to issue the warrant on the State Treasurer. Shuck presented his warrant to the State Treasurer who refused to issue a check because there were no funds available in his hands for that purpose. Thereupon, Shuck brought another mandamus suit, this time against the State Treasurer to compel him to issue a check upon the public funds in his custody. The lower Court decided in favor of Shuck and ordered the Treasurer to issue the check, but the

Court of Appeals reversed the judgment of the lower Court and held that the courts could not compel the State Treasurer to draw a check upon public funds in payment of a warrant, when there were no monies in the fund upon which the warrant was drawn, notwithstanding the fact that the same Court had previously compelled the Auditor to issue the same warrant. The Court at page 462 said:

> "Ordinarily, when the law recognizes the validity of a claim against the State, it is payable out of *any funds* in the treasury *not otherwise* appropriated, *but a wholly different rule prevails where a claim against the State is payable only out of a specific appropriation, which has been exhausted.* When this state of case is shown to exist, the courts *cannot by mandate* require the *Auditor to issue* a warrant for the claim, *or the Treasurer to pay it.*" (Citing authorities.)

In the light of the foregoing facts therefore, what is the practical remedy given to the appellants under Section Ten? The money which appellants pay under protest is immediately expended for other purposes. The fund, out of which the warrant which he may get in an action at law is to be paid, is exhausted, and no provision for replenishing the fund is in existence. All that the appellants would get would be a warrant which cannot be collected until such uncertain time in the future, if ever, when provision is made for the payment of the public debt. This remedy is not certain for the reason, as we have seen, that the Commonwealth of Kentucky, in 1924, in 1926 and in 1932, refused to recognize or discharge this public debt. Can it be said that the remedy is certain when the Commonwealth of Kentucky has steadfastly refused to pay outstanding warrants since 1924? Can it be said that the remedy is certain when it is a fact, as is shown by the pleadings and the evidence in these cases, that no warrants have been paid since the year 1927, and that there are no funds in the Treasury

now, and none provided for the future payment of such warrants, if at all?

The Court of Appeals of Kentucky has held in Kentucky Statutes, Carroll's Ed. 1930, Sec. 4688a-4; *Rhea, Treasurer,* v. *Newman,* 153 Ky. 604-618; *Bosworth, Auditor,* v. *State University,* 154 Ky. 370-373, that the outstanding warrants shall be paid by the Treasurer in the order issued for the purpose of insuring fair treatment to all. So, the most that could be obtained by the appellants in the way of an adequate remedy at law under Section Ten of the challenged Act would be to get a warrant, which could not be paid until over Fourteen Million Dollars in previous warrants have first been discharged, with no funds on hand and no provision at law for the discharge of any of such warrants.

The lower Court in its opinion (Stewart Rec. 249), states:

> "It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate."

The Court then says:

> "But no such unreasonable delay is indicated."

We submit that the Court misinterpreted the allegations of the Bill and the evidence in this latter statement. How can it be said that "no such unreasonable delay is indicated" in view of the uncontradicted facts in the record as to the past, present, and probable future condition of the "general fund," out of which the warrants obtained under Section Ten can only be paid?

The facts in the record show as heretofore stated, page 11, that the challenged Act, a revenue measure, imposed a total tax upon all the retail merchants in the State of

Kentucky of approximately $450,000.00 in the taxable year 1930, and of this amount the twenty-five or thirty merchants, in whose behalf these actions were instituted, would be required to pay almost $400,000.00 of this tax; the remainder, about $65,000.00, to be divided among the other 17,000 retail merchants of the State. The revenue under this Act is paid out immediately under Section 9 thereof, one-half t be used in re-building the State penal and charitable institutions and the other half in paying off the public debt. The Act expressly requires that the Auditor having taken complainants' money for the State shall apply it for the specific purposes stated in Section 9. As a result, half of every dollar which the appellants pay under the law, which we must not forget constitutes about 85% of the total tax collectible under the Act, goes to pay an old warrant against the "general fund" that someone else has been holding for years, while waiting for the legislature to provide taxes for its payment. The other half goes to rebuild prisons and asylums.

This statute, expressly limiting the taxpayer to recourse against a fund not augmented by the exactions from him, is wholly without precedent in the legislation of Kentucky, or any other State, so far as we have been able to learn. In actual operation, it is designed to encumber and delay, if not to defeat the refund it professes to authorize.

A provision somewhat similar, but far more honest and effective, is contained in a Kentucky statute levying for the benefit of the public road fund an excise tax on sales of gasoline. That statute, however, differs from the challenged Act in that its Section 9 (Ky. Stat., Carroll's 1930 Ed., No. 4224b-9) provides that the refund shall be made by the Treasurer "out of the public road fund of the State." In other words, the refund is allowed out of the fund augmented by the tax, so that it might be assumed that money will be on hand and available to make the re-

fund. This is true of statutes construed by this Court in cases like:

Matthews v. *Rodgers*, 284 U. S. 521-528;
Stratton v. *St. L. & S. W. R. R.*, 284 U. S. 530-533.

Not so under Section Ten. Hence, it is practically impossible, under the challenged Act, for a taxpayer to realize anything upon any refund within any reasonable length of time.

(b) Kentucky has not consented to being sued at law in the Federal Courts.

The eleventh amendment of the Federal Constitution provides that the judicial power of the United States shall not extend to any suit at law against a sovereign state. An action by a taxpayer to recover taxes previously paid, is a suit against a state and comes within the prohibition of this amendment. This is true, although the suit is in form an action against a state officer. *Smith* v. *Reeves*, 178 U. S. 436; *North Carolina* v. *Temple*, 134 U. S. 22; *Chandler* v. *Dix*, 194 U. S. 590.

While this immunity from suit may be waived by the state, such waiver must be clear and explicit. Section 231 of the Kentucky constitution provides:

> "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

This provision is not self-executing. An act of the General Assembly is necessary to create a waiver. Such waiver must be clear and explicit. "Statutes in derogation of the sovereignty of the state must be strictly construed." *Smith* v. *N. Y.*, 227 N. Y. 405, 125 N. E. 841.

Section Ten, neither in terms, nor by implication, contains any assent to an aggrieved taxpayer's suing the state of

Kentucky in the Federal Courts. In *O'Connor* v. *Slaker*, 22 Fed. (2d) 147 (C. C. A. 8), the Court considered the immunity of Nebraska from suit and said, at p. 151:

> "We find no statute, however, of Nebraska, expressly consenting in terms that the state may be sued in the Federal courts by a citizen of another state."

A state's consent to be sued in the Federal Court will not be implied from its consent to be sued in its own Courts. *Chandler* v. *Dix*, 194 U. S. 590; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151; *Highway Commission* v. *Utah Co.*, 278 U. S. 194.

The authorization contained in Section 10 to bring suit against the State contains no provision for suit in the Federal Courts and in the absence of such a provision the statute must be construed as an authorization to sue in the State Court.

In *Smith* v. *Reeves*, 178 U. S. 436, at page 445 the Court declared:

> "In our judgment it was competent for the state to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the State Board, *the condition that the suit be* brought in one of its own courts."

We submit that this is the situation under Section 10 of the Kentucky law.

As stated before, Section 10, although it provides for an action at law against the state for recovery of the money paid, does not provide where this action shall be brought. We are left to other Kentucky decisions and legislative provisions of the Court of Appeals of Kentucky for a proper determination of this question.

The action provided for by Section 10 is a suit against the Auditor of Public Accounts, that is, an action against an officer of the State.

Section 63 of the Kentucky Civil Code of Practice provides that actions must be brought in the County where the cause of action or some part thereof arose when the suit is brought "against a public officer for an act done by him in virtue or under color of his office." The collection of the tax is made by the Auditor in virtue or under color of his office and the suit against him must be brought in the county where the action arose. When the Auditor fails or neglects to issue his warrant on the Treasurer in favor of the person entitled to such a warrant a cause of action arises in favor of that person. The Auditor's office is in the State Capitol, located at Frankfort, in Franklin County. The action arises at the place *where* the Auditor fails to issue his warrant, namely, in Franklin County.

In *Commonwealth* v. *Morrell Refrigerator Car Co.*, 129 Ky. 738, the Court of Appeals of Kentucky had under consideration the failure of a corporation to make certain reports under Kentucky Statutes 1903, Section 4087. This Section made the failure to file such reports a misdemeanor. The question involved was whether the prosecution for this misdemeanor should take place in Carlisle County where the company had its principal place of business, or in Franklin County. The Court held that the cause of action arose in the county where the corporation failed to file its report, namely, Franklin County, and that because of Section 63 of the Code of Civil Practice the action should have been brought in that county.

The remedy provided by Section 10 is the right to file an action in order to require the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky.

Section 340a-2, Carroll's Kentucky Statutes, provides that the Circuit Court of Franklin County shall have jurisdiction of "all claims against the Treasurer allowed and approved by any Court in this Commonwealth, to any officer

of the Commonwealth, or to any person whatsoever." In construing this section the Court of Appeals in the case of *Greene* v. *Wolf*, 175 Ky. 58, held that the Franklin Circuit Court was invested with the *exclusive* jurisdiction of proceedings to compel the Auditor to pay claims against the State. On page 61 of its opinion the court said:

> "When we look at the purpose of the section (Ky. Stat. No. 340a-2) we have but little difficulty in concluding that it was the intent of the Legislature to confer exclusive jurisdiction upon the Franklin Circuit Court in all proceedings against the Auditor to compel him to issue his warrant against the treasury."

Although Section 10 does not state where the action for the recovery of the money could be maintained in the event the money was paid under protest, the Legislative acts and decisions of the Court of Appeals of Kentucky have definitely fixed the place of suit in the Circuit Court of Franklin County. All that we have, therefore, is an authorization to sue the State of Kentucky in its state courts. The complainants, therefore, would have a perfect right to appear in the Federal Court but have not been granted the right to sue for the recovery of money so as to avoid the restriction of the Eleventh Amendment to the Federal Constitution. The complainants therefore do not have an adequate remedy at law in the Federal Court.

In *Risty* v. *Chicago Railway Co.*, 270 U. S. 378, the Court pointed out that the remedy afforded by the State statute was not available in the Federal Court and said at page 338:

> "The test of equity jurisdiction in a Federal Court is the inadequacy of the remedy on the law side of *that* court, and not the inadequacy of remedy afforded by the state courts."

Chicago Railway Co. v. *Osborne*, 265 U. S. 14; *Standard Oil Co.* v. *Atlantic Coast Line*, 13 Fed. (2nd) 633-635, are like decisions.

In *Smyth* v. *Ames*, 169 U. S. 466, at page 516, the Court said:

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled, upon any ground, to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

A recent decision, which is directly in point on many of the jurisdictional questions of this case, is *Southern Railway Co.* v. *Query*, 21 Fed. (2nd) 333. Plaintiff prayed for an interlocutory injunction to enjoin members of the South Carolina tax commission from enforcing an unconstitutional tax measure. At the first hearing, the Court dismissed the complaint. Upon re-hearing the Court's attention was called to the fact that there was no adequate remedy at law, because the only remedy given by the statutes of South Carolina was an action to recover the tax after payment under protest. Such action, the Court said, would be a suit against the state, which could not be brought in the Federal Court because South Carolina had only waived its immunity from suit in the state Court, and nowhere else. The entire opinion, upon re-hearing, is relevant to the questions under consideration here. Section 32 of the South Carolina tax act is similar to Section 10 of the Kentucky Act. In discussing this section, the Court said at page 344:

> "There can be no doubt but that the remedy provided by section 32 is a suit against the state. The

object of the suit is to compel the state to perform its obligation to repay from state treasury taxes illegally collected and under the decisions of the Supreme Court of the United States, such a suit is a suit against the state. *Smith* v. *Reeves*, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; *Ex Parte New York*, 256 U. S. 490, 500, 501, 41 St. Ct. 588, 65 L. Ed. 1057; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 168, 169, 29 S. Ct. 458, 53 L. Ed. 742.

The Eleventh Amendment to the Constitution of the United States forbids a suit against a state, but the state may waive its immunity from suit, and when it does waive its immunity and consents to be sued in its own courts, this does not constitute a consent to be sued in a federal court. *Smith* v. *Reeves*, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; *Chandler* v. *Dix*, 194 U. S. 590, 24 S. Ct. 766, 48 L. Ed. 1129; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 168, 172, 29 S. Ct. 458, 53 L. Ed. 742.

In *Murray* v. *Wilson Distilling Co., supra*, the Supreme Court used the following language: 'And it is elementary that, even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States,' citing *Smith* v. *Reeves, supra; Chandler* v. *Dix, supra*. . . .

While these principles are firmly established, it is, however, equally well-settled that the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. In other words, if a suitor has sufficient ground to invoke the jurisdiction of a federal court of equity, a remedy at law in the state court which is not available in the federal court is not sufficient to deprive a federal equity court of jurisdiction. *Smythe* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *C. R. I. & P. R. R. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641."

(c) The only remedy provided in the Act is an action in mandamus against the State Auditor, which the Federal Courts cannot entertain.

Section Ten provides for an action at law against the Auditor of Public Accounts. There is no statement as to which form this action at law should take. We are again relegated to other Kentucky legislative acts and decisions in order to determine what form of action must be brought.

The Commonwealth of Kentucky has provided by Section 162 of Carroll's Kentucky Code an authorization for recovery of money paid into the State Treasury for taxes when no such taxes were due. When this situation arises it becomes the *duty* of the Auditor to issue his warrant on the Treasury for the money so improperly paid. If the Auditor refuses to issue his warrant, the only method known to the law for enforcing the duty laid upon him by Section 162 is to bring a common law action of mandamus against him to compel him to comply with his duty. This is the procedure which has been uniformly invoked under this section. *Louisville Gas and Electric Company* v. *Bosworth*, 169 Ky. 824, 185 S. W. 125; *Green* v. *E. H. Taylor, Jr., & Sons*, 184 Ky. 739, 212 S. W. 925; *Craig* v. *Security Producing and Refining Company*, 189 Ky. 565; *Craig* v. *Renaker*, 201 Ky. 576, 257 S. W. 1018.

The language in Section 10 is similar to the language in Section 162. In both places there is a declaration that it shall be the *duty* of the Auditor to issue a warrant.

Section 477 of the Civil Code of Practice of Kentucky defines "mandamus" as follows:

> "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and

> is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

The only remedy available to the taxpayer under Section 10 being an action of mandamus it cannot be maintained that payment of a tax under protest, coupled with suit to recover in accordance with Section 10, constitutes an adequate remedy at law available in the Federal courts. An action of mandamus cannot be maintained in the Federal Court. *Graham* v. *Norton*, 82 U. S. 427.

In *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109, the syllabus reads, in part, as follows:

> "Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an ordinary action for the purpose of securing relief by the writ, although the relief sought concerns an alleged right secured by the Constitution of the United States."

Additional authorities in support of this general rule are: *Knapp* v. *Lake Shore Ry. Co.*, 197 U. S. 536; *Rosenbaum* v. *Bauer*, 120 U. S. 450.

If the Kroger Company were compelled to pay $339,150.00, the approximate tax now due, under protest, to the Auditor of Public Accounts and then endeavored to recover back the payment in an action at law in the Federal Courts, its right to recover would be denied on the grounds that its action was a suit against the sovereign State of Kentucky, prohibited by the eleventh amendment, and that the only remedy provided by Kentucky was an action in mandamus against the Auditor of Public Accounts, to compel him to draw his warrant upon the treasurer of the state, a remedy not cognizable in the Federal Courts. For these reasons Kroger and all other taxpayers entitled to invoke the jurisdiction of the Federal Courts and to maintain an action in

the Courts of the United States would be relegated, if it were compelled to proceed at law, to an action in the Circuit Court of Franklin County, Kentucky, by way of mandamus against the Auditor of Public Accounts. It is too clear for extended argument, that this is not an adequate and complete remedy at law in the *Federal* Courts and that the plaintiffs in the present cases, are entitled to invoke the equitable jurisdiction of this Court.

(d) Appellants cannot refuse payment of the tax and subject themselves to suit because of the drastic civil and criminal penalties provided in the Act.

As previously stated in this brief, page 6, the taxes assessed against these four appellants for the three years now in question, amount to almost a half million dollars. Section 5 of the Act provides a penalty of 20% for failure to file a report and an additional penalty of 20% for failure to pay without suit. If the appellants would resort to the remedy at law of refusing to pay the tax, and should they be defeated in litigation brought by the State to collect the tax, they would be subject to a penalty of almost $200,000.00 for the three years in question and, besides, in the Levy case, because it is not a corporation but a partnership, the individuals composing the partnership would be guilty of a misdemeanor punishable by fine and imprisonment under Section 7 of the Act.

These penalties provided by the Act are so drastic that a taxpayer dare not test the Act by permitting suit to be brought against him. The taxpayer is coerced by excessive penalties, into yielding to the provisions of the law for fear of the penalties.

Not only that, but Section 6 of the Act gives the state the right to seize the taxpayer's property by attachment and garnishment without the giving of a bond. Such dras-

tic penalties have been held so severe as to intimidate taxpayers from litigating, and hence to deny them the equal protection of the laws. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, at pp. 100 to 102; *Ex parte Young*, 209 U. S. 123; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150; same case, 157 Fed. 849, affirmed on this point in 212 U. S. 19; *Old County Trust Co.* v. *Seattle*, 271 U. S. 426.

(e) The amount of tax assessed under the Act against the appellant is very large, causing serious financial embarrassment to require its payment. The right to recover back this tax if it should be paid under protest is so uncertain as to leave the appellants without a complete and efficient remedy except in equity.

The Stewart Bill of Complaint alleges that the taxes which it would be required to pay under the Act will be a substantial portion of the capital invested by it and needed by it to carry on its business; that the payment of such tax will impair the ability of the plaintiff to operate its business in Kentucky and will possibly decrease the annual amount of business which it will be enabled to do. (Stewart Record, p. 37.) Similar allegations are in each of the other Bills.

At the time of the hearing of these cases in the lower Court one of the Judges asked counsel for appellant this question: "Why don't you pay the tax under protest and sue to get it back? Are you afraid?" Counsel for appellant answered: "We are afraid that we will never get it back. It is not clear just how we are going to get it back. There is so much doubt about it that we are afraid to take the risk, and besides, the amount of tax which we have to pay is so large that it is a great burden on us to pay it when it is so apparent that the Act is invalid."

In these critical financial times when even the greatest of our business institutions are finding it difficult to meet

maturing obligations, and when our great semi-public corporations, like railroads, life-insurance companies and national banks are imploring the aid of the Federal Government to enable them to meet their current obligations, it is certainly out of tune with things to require these appellants to pay out almost a half million dollars under an Act such as this, if there is any doubt in the world about their right to get the money back with interest immediately if the Act is held invalid.

In *Raymond, Treasurer of Cook County*, v. *Chicago Union Traction Co.*, 207 U. S. 20, this Court recognized that a taxpayer in such a case as this presents grounds for equitable relief when the payment of the tax would render the taxpayer insolvent and subject its property to a levy which would interfere with the operation of its business. There is no allegation in the Bills here or in the evidence that the tax exacted from these appellants would render them insolvent, but there are allegations in the Bill supported by evidence in the record that the payment by these appellants of almost a half million dollars in taxes would seriously embarrass them in the operation of their business. Likewise, the Act itself gives the State a right to levy upon all the property of the appellants to collect the tax. We submit, therefore, that the appellants because of the amount of tax involved will suffer certain and irreparable injury, with grave doubt of the right within any reasonable time to recover back the payments if the tax is held invalid. On the other hand, the State is not inconvenienced in any degree. It should not want to collect and disburse taxes until its right to do so is beyond question. And, besides, it is amply protected against every inconvenience and loss by the bond which a court of equity would require of the appellants.

(f) Appellants are entitled to maintain these actions as class suits under Equity Rule 38.

Each bill contains averments necessary to a "class suit" under Equity Rule 38 (see Stewart, 29-30, Kroger, 5). Upon these averments the Court made the following order (Stewart, 39):

> "On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930."

Numerous other taxpayers came in under these orders. For example, in the Stewart bill (Stewart, 30) twelve others are specifically named, and they are protected by the restraining order (Stewart, 42-44, 246-247).

Likewise in the Kroger suit, forty-eight such taxpayers are specifically named in the Court's orders as protected thereby (Kroger, 72, 84, 96). No objections were made or exceptions taken to these orders.

In the recent case of *Matthews* v. *Rodgers*, 284 U. S. 521, the Court held that generally the jurisdiction of equity to avoid multiplicity of actions does not extend to cases where there are numerous parties plaintiff and the issues between them and the adverse party are not necessarily identical. In that case, however, the plaintiff was not suing as a representative of a class under Equity Rule 38.

Equity Rule 38 provides as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

In *Gramling* v. *Maxwell*, 52 Fed. 2nd 256, the Court had under consideration an action brought to enjoin a state statute under Equity Rule 38. The Court declared, in speaking of this statute: "Whatever may have been the rule formerly as to the right to maintain a class suit of this character in the Federal courts, we think that since the adoption of the 38th Equity rule (28 U. S. C. A. 723) the right to maintain such a suit cannot be denied."

The four cases before the Court have been considered since their inception as having been brought pursuant to Equity Rule 38. We do not believe that there can be any question that they come within the definition of a class suit.

All of the parties in these cases, if they paid the tax, would be required to look for repayment to the insolvent general fund of the State of Kentucky. They have therefore a community of interest which binds them together in one class and gives the Court jurisdiction over an action brought by one on behalf of all the others.

Opinion of the lower court.

The lower Court reached the conclusion that the complainants were required to pay the taxes under protest and bring an action under Section Ten, if they claimed the taxing measure was unconstitutional. The Court disregarded the fact that Section Ten is an integral part of the taxing measure. There was no intention on the part of the legislature of Kentucky to provide a new method of suing

the State on questions other than those arising under the gross sales tax law. Section Ten would not have been enacted if the gross sales tax measure had not been passed. If the gross sales tax law is invalid the entire measure falls, including the provision for recovery contained in Section Ten. *Allen* v. *Louisiana*, 103 U. S. 80; *Hill* v. *Wallace*, 259 U. S. 44; *Williams* v. *Standard Oil*, 278 U. S. 235. As a result, the taxpayer is placed in the following position: If he pays the tax under protest and brings an action to recover it on the ground of the invalidity of the taxing measure in accordance with Section Ten, and if he proves the correctness of his contention, then as a result of having the law declared invalid he deprives himself of the only remedy provided by the legislature of Kentucky. At the same time that he proves his right to recover he destroys the section which operates as an authorization by the State of Kentucky to bring an action at law against it. As a result, he loses the right to sue the sovereign, and although he has proved his right to recover he is unable to secure a refund of the money paid under protest.

The gross sales tax law was newly enacted at the time complainants brought their action. No interpretation of the law had been made and insofar as the question of adequacy of remedy at law in the Federal Court or the procedure under Section Ten are concerned, no interpretation has been made up to the present time.

The same is true in regard to the question of priority of warrants to which the plaintiff would be entitled in case it paid the tax under protest and brought an action under Section Ten.

In the case of *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, the North Carolina Income Tax Law was assailed by a Bill in Equity. The state moved to dismiss the Bill (425)—"because there is under the laws of North Carolina a plain, adequate and complete remedy at law by which a

taxpayer may recover the amount of an illegal tax paid by him under protest."

Denying the motion to dismiss, the Court said:

> "Our attention has been called to several North Carolina cases and the statute bearing upon this contention. But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say the remedy at law is plain and adequate (citing authorities). We have therefore passed upon the merits."

The opinion of the lower Court fails to recognize the fact that Section Ten was recently enacted. The interpretation placed on the statute by the lower Court was its interpretation and not the interpretation by the Court of Appeals of Kentucky. The whole opinion gives one an impression that the lower Court attempted to construe Section Ten in such a manner that they would read into it an adequate remedy at law for the plaintiff. In other words, they tried to construct out of Section Ten an adequate remedy at law which did not exist. If the plaintiff accepted the decision of the lower Court, paid its money under protest and brought suit to recover, it was apt to be met with a different construction and the adequate remedy at law to which it was entitled would be denied it.

The presumption indulged by the lower Court in its opinion (Stewart Record p. 238) to the effect that it will not be presumed that the legal remedy provided was intended to be confined to the state Court is incorrect. On the contrary, the proper presumption is that a state cannot waive its immunity by inference, but can only do so by express language. *Smith* v. *New York*, 227 N. Y. 405, 125 N. E. 841; *O'Connor* v. *Slaker*, 22 Fed. (2d) 147.

The Court state that they conclude that the legal remedy provided by Section Ten was intended to be available

in the Federal Courts as well as in the state Court. This statement is made by the Court without taking into consideration the general Kentucky statutes which fix the venue in Franklin County.

The Court is incorrect in its argument in regard to interest which appears on page 242, Stewart Record. The warrants only bear 5% interest, while the legal rate of interest in Kentucky is 6%. The Court, at page 242, reaches the conclusion that even if the warrants are only salable at a discount, nevertheless the fact that interest is given eliminates the claim that the issuance of such a warrant does not give the plaintiff an adequate remedy at law. This argument is predicated on the theory that "so far as we are advised the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate." (Opinion p. 242, Stewart Record.)

In the case of *Hopkins* v. *So. California Telephone Co.*, 275 U. S. 393, the Supreme Court specifically states that the failure to provide for the payments of interest gives the taxpayer the right to go to equity even though the state permitted a suit to recover taxes paid.

The lower Court placed some reliance on the fact that the warrants are exempt from state and local taxation. (Opinion p. 242, Stewart Record.)

The Court fails to take into consideration the fact that Kroger is a corporation under the laws of the State of Ohio and that the situs for their taxation would be Ohio. Whether or not Kentucky exempts these warrants should therefore have no bearing on this case. In *Blodgett* v. *Silberman*, 277 U. S. 1, the Court held that bonds and warrants of indebtedness of the United States were choses in action and were subject to tax at the domicile. See also *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204, Syl. 1, in regard to certificates of indebtedness issued by a state being taxable at the domicile of the owner.

The lower Court is incorrect in its argument in regard to mandamus.

The lower Court admits that an action of mandamus is necessary in order to secure to the complainants the rights given by the Act and the Court also admits that an action in mandamus cannot be maintained in the Federal Court. The Court contends, however, that this particular action in mandamus is ancillary to the original relief sought. This forces plaintiff to take two actions where only one is needed in equity. As a result the lower Court recognizes that the plaintiff does not have as effective a remedy at law as it would have in equity. Furthermore, a judgment would only be prima facie evidence of a debt under Section 340 a-1, Carroll's Kentucky Code, and the complainant would have to prove its case twice in order to secure relief.

Section 340 a-1 of Carroll's Kentucky Code provides as follows:

> "That the order of any of the courts of this Commonwealth now authorized by law to approve and allow . . . . claims against the Treasury of any of the officers of the Commonwealth, or of other persons having claims against the Treasury, shall only be regarded as prima facie evidence of the correctness and legality of such . . . . claim; and such order shall in no case be treated as a judgment or be made conclusive against the state; but the auditor . . . . may . . . . refuse to pay, and may contest the same in the Franklin Circuit court . . . ."

If the claimant would secure an order in accordance with Section Ten, the Auditor might refuse to pay, and contest the claimant's right to recover in the Franklin Circuit Court. All that plaintiff is given by Section Ten, therefore, is a right to establish prima facie evidence of the legality of his claim. Bearing in mind that a remedy at law is one

which is certain, complete, prompt, practical and efficient to attain the ends of justice, it cannot be maintained that the remedy provided by Section Ten is sufficiently effective to constitute an adequate remedy at law.

In *Standard Oil Co.* v. *Atlantic Coast Line*, 13 Fed. (2d) 633, at 635, the Court declared:

> "It is well settled, however, that to constitute an adequate remedy at law, the remedy must be as complete, practicable and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity (citing authorities), and must be available to the plaintiff in a Federal court."

In *Davis* v. *Wakelee*, 156 U. S. 680, the Court held that where there was doubt as to the construction which a petition would receive in the state Courts, an equitable action was properly brought in the Federal Courts. We quote from the language of the Supreme Court at page 688:

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of suit. (Citing cases.) Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." See also *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282-287.

Even if the complainant would pursue the course provided by Section Ten of the challenged Act and would pay the taxes under protest and bring an action at law to recover the money paid on the ground that the statute was invalid, in which action complainant would be successful, it still would not have a certain remedy within the requirements of the rules laid down by the Supreme Court.

The lower Court in its opinion concedes our claim that a meaningless judgment would not be an adequate remedy at law.

In its opinion the Court states (p. 240 Stewart Record):

> "It may be conceded that if taxpayers obtain judgments under Section 10 and are compelled to wait an unreasonable length of time for their money the remedy at law given by this section would not be adequate."

Further in its opinion (Stewart Record p. 241) the Court states that the remedy at law "would not be full and complete unless the holders of judgments obtained under its provisions (Section Ten) could secure the reasonably prompt payment thereof."

In these statements the Court is in accord with the declaration of the Supreme Court in the cases of *Matthews* v. *Rogers*, 284 U. S. 521, and *Stratton* v. *St. Louis Railway*, 284 U. S. 530.

The lower Court reaches the conclusion that no such reasonable delay has been shown in the record. They state that the State of Kentucky is only two years behind in its payments. The record shows that no payments have been made on warrants for two and one-half years. This alone is an unreasonable length of time. However, the Legislature of Kentucky has indicated that no warrant has been paid for five years (Acts 1932, Chapter 20). We believe that a delay of five years in payment of money due under a warrant issued is an unreasonable length of time. It certainly gives the taxpayer no adequate remedy at law when there is a showing that there are no prospects of the State catching up in its payments. The insolvency of the fund out of which the complainants must hope to recover has

been shown in the Bills of Complaint and was admitted to be true by defendants' motions. We have, therefore, in the record sufficient allegations of special circumstances which show that a judgment would be meaningless and complainants are therefore entitled to proceed in equity. *Matthews* v. *Rogers, supra; Stratton* v. *Railway Co., supra.*

The lower Court indicated that it was not certain as to plaintiff's rights under Section Ten. This lack of certainty gives plaintiff a right to proceed in equity.

An examination of the lower Court's opinion shows that it was somewhat troubled by complainant's contention that the inability of the Commonwealth of Kentucky to pay warrants rendered the remedy provided by Section Ten inadequate. On the record complainants showed that no warrants had been paid for a long time and that outstanding warrants exceeded the funds in the State Treasury by $9,800,000.00. Although the Court did not make the statement, it realized that if the complainants were forced to wait until the $9,800,000.00 worth of warrants outstanding at the time the suit was filed were paid, the complainants would have to wait an unreasonable length of time. To justify its opinion the Court attempted to render an interpretation of the statute which would eliminate the necessity for such a long wait. The Court states (opinion page 240 Stewart record):

> "The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that Section is that such warrants shall be paid when presented if, there is sufficient money in the general fund to do so, even though there may be outstanding other and prior warrants against this fund."

Disregarding for the moment the fact that there is no basis for such an interpretation, we believe that this statement clearly indicates the uncertainty of complainant's remedy as provided by Section Ten. Let us assume that the complainants were satisfied with the lower Court's opinion and proceeded under Section Ten and were successful in securing a warrant on the State Treasurer. If complainants would present these warrants to the Treasurer there would be nothing to prevent him from refusing to pay them out of order, and in case plaintiff attempted to bring an action to coerce him into such an action a result different from that reached by the lower court might be arrived at by the Court of Appeals of Kentucky. In fact, we believe that there can be no doubt that such a different result would be reached in view of Section 4688a-4, Carroll's Code of Kentucky, and of the case of *Rhea* v. *Newman*, 153 Ky. 604, which holds that warrants must be paid in the order in which they are issued. The lower Court itself realizes the weakness of the statement quoted above. On page 241 (Stewart Record) of its opinion the Court said that although there was no express direction to pay warrants in the order they are issued "such is probably the fair inference to be drawn from language used in Section 4688a-4, Carroll's Kentucky Statutes, and the decision of the Kentucky Court of Appeals in *Rhea* v. *Newman*, 153 Ky. 604."

The Court indicates that if these warrants are not paid out of order the plaintiff would not have an adequate remedy at law. Its interpretation of the statutes is not binding on the Treasurer of the Commonwealth of Kentucky and its attempted explanation of the statute clearly brings this case within the language of *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, at page 426, where the Court declared:

> "The statute mainly relied upon is a recent one which appears not to have been construed and applied

> by the highest court of the state. In the absence of such decision you cannot say the remedy at law is plain and adequate. We have therefore passed upon the merits."

In the absence of any decision as to whether these warrants can be paid out of order, and in view of the law of Kentucky which says they must be paid in the order of their issuance, the complainants' remedy at law cannot be said to be plain and adequate. Consequently, the lower court should have passed on the merits.

In reaching the conclusion that warrants issued under Section Ten should be paid out of order, the court states:

> "It *seems* entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10, priority of payment over other outstanding warrants against the general fund." (Stewart Record page 241.)

The use of the word "seems" shows that there was some doubt in the court's mind. This term connotes doubt.

In *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, at page 296, the Court quoted from *Davis* v. *Wakelee*, 156 U. S. 680 at 688, and said:

> "It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.' "

In this case there is doubt as to whether plaintiff could ever secure payment of its warrants even if those warrants were to be paid out of order. But there is an additional doubt as indicated by use of the term "seems" by the lower court as to whether the warrants would be paid out of order. The remedy therefore is doubtful and the lower court should not have declined cognizance of the suit.

The lower Court's argument that legislature may enact a measure looking to the payment of warrants does not give complainants an adequate remedy at law.

In the Court's opinion (Stewart Record page 242) it states that the warrants of Kentucky are readily salable. There is nothing in the record to support this declaration. As a matter of fact, Kentucky warrants can only be sold at a discount. This fact, as we have previously pointed out at page 21 herein, is so widely known that this Court will take judicial notice of the situation.

In the record we have alleged that warrants have not been paid for a long period; that there are outstanding $9,800,000.00 worth of warrants in excess of the money in the Treasury needed for payment. In view of such a situation, it can be readily seen that the Court's declaration in regard to salability of warrants is absolutely incorrect.

At the bottom of page 242 (Stewart record) appears a declaration of the lower court that Kentucky has no bonded indebtedness and that it is entirely solvent. There is nothing in the record to support this statement and the lower Court has completely disregarded the fact that the holders of warrants can only hope to be paid out of a particular fund which is hopelessly insolvent.

The statement on page 242 above referred to, is followed by a declaration that the General Assembly of Kentucky has unlimited power to tax and that with this unlimited power the Court will not assume that an aggrieved taxpayer cannot recover within a reasonable time. The fact remains that the Legislature of Kentucky has recognized that holders of warrants have not been paid for five years. Further, the Court of Appeals of Kentucky has recognized that this situation amounts to virtual repudiation of the state's obligations. The Legislature has shown that it will not enact legislation in sufficient time to enable an aggrieved taxpayer to recover in a reasonable time.

In an attempt to construct for the complainants an adequate remedy at law which does not exist, the lower Court attempts to force the taxpayer to rely on the willingness of the State Legislature to enact some measure which will revitalize the general fund and enable the State Treasurer to pay past due warrants. This puts the taxpayer in a precarious position, because the Legislature may never be moved to pass such a measure. A taxpayer does not have an adequate remedy at law when his chance to recover is left to the whim of the legislature. Moreover, the legislature is without power to refund the debt by a bond issue without a vote of the people. *State Budget Commission* v. *Lebus*, 244 Ky. 701.

Furthermore, states have been known to repudiate their debts. The situation in Kentucky has been recognized by its Court of Appeals as tantamount to repudiation. A presumption contrary to that reached by the lower Court would be perfectly justifiable under present-day conditions when tax receipts are low and expenditures are high.

As an example of what the taxpayer may expect if he relies on the legislature to pass a taxing measure which would enable him to collect the outstanding warrants, we wish to refer to the action of the legislature in its last session. One of the first measures introduced in the lower House was an act to prohibit the issuance of any warrants unless sufficient money was in the State Treasury to pay the claim. This was House Bill No. 13 and was introduced by Mr. Frank Lebus. The measure was favorably reported by the Committee to which it was referred, but it was not passed. It manifested an intention to deprive the taxpayer of his right to a worthless warrant. If the measure had passed, the taxpayer would be in a position where, under the sales tax law, he would pay his money to the state, which money would be immediately expended by the state,

leaving the taxpayer with a right to sue for a warrant which the Auditor could not issue.

Although the measure did not pass, it is indicative of the state of mind of the legislature and clearly shows that the lower Court was incorrect in saying that the taxpayer could rely upon the unlimited power of the Legislature of Kentucky to tax.

Point II-a.

Appellants are entitled to an interlocutory injunction under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813.

In the trial of the four cases before the three-judge court both plaintiffs and defendants introduced *ex parte* affidavits in support of their contentions.

The United States Supreme Court, in the recent case of *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 814, 815, has definitely established the right of these plaintiffs, in an action brought pursuant to Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), to obtain an interlocutory injunction for the protection of their interests as taxpayers against the illegal claims sought to be asserted against them by the defendants, as set forth in the bills of complaint. The opinion *per curiam* in that case, in dealing with this very subject, says (p. 815):

> "Where the questions presented by an application for an interlocutory injunction are grave, and an injury to the moving party will be certain and irreparable if the application be denied and a final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by bond, the injunction usually will be granted."
>
> (Citing *Love* v. *A. T. & S. F. Ry. Co.*, 185 Fed. 321, 331-332.)

Commenting upon the application for an interlocutory injunction in that case, the Court said it was submitted on *ex parte* affidavits (pp. 814-815),

> "which are harmonious in some particulars and contradictory in others. The affidavits, especially those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined."

In the instant case the affidavits of the defendant are subject to the same criticism made in the *Conway* case.

In concluding its opinion in that case the Court said that the application for an interlocutory injunction should be granted upon terms requiring:

> (a) That plaintiff pay the tax fixed by the prior Act, which was not contested (whole tax contested here);
>
> (b) Give an adequate bond to pay the tax with interest and *without other penalty* exacted under the amendatory Act if it should be adjudged valid by final decree, and
>
> (c) Prosecute the suit with reasonable expedition to a final decree.

We believe that the above decision conclusively fixes the right of the plaintiffs to an interlocutory injunction upon the facts shown by the Bills of Complaint and the affidavits filed in support thereof.

(b) Appellants are entitled to an interlocutory injunction because the challenged act deprives them of the equal protection of the laws.

The discriminatory features of the Act are illustrated in various ways by the different cases which have been presented. The discrimination in the Stewart case has been shown by the fact that that Company with $3,000,000.00 worth of sales has to pay a tax which is one-half as large as that which 16,353 merchants pay altogether upon sales aggregating nearly 80 times the volume of Stewart's sales.

The discrimination in regard to Stewart is further illustrated by the fact that that Company is required to aggregate the sales in all of its departments for the purpose of determining its tax rate. Stewart's is a department store having seventy separate departments. Each department is in purpose and in fact a separate unit distinguished from the other departments in Stewart's and each is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department in Stewart's sells articles which have no relation to the articles handled in other departments. The annual sales in any single department do not exceed $400,000.00. The maximum sales in Stewart's departments are $250,000.00.

Each department in Stewart's competes with specialty stores in the City of Louisville which sell the same line of goods and in many instances the sales of a particular department in Stewart's are considerably less than the sales of a specialty store competing with Stewart's in the particular line of goods handled.

The Stewart record illustrates numerous examples of this situation. (Record page 70.) In spite of this, however, the competitors of the particular departments only have to pay at the rate of 1/20 of one percent and their total

tax is often wiped out by the exemptions they are allowed. In the case of Stewart's, however, each department has to pay at the rate of practically one percent, merely because the sales in that particular department are added to the sales of other departments which handle goods of a different character.

Because each department handles a different type of goods Stewart does not have the advantage of mass buying which was found to be a basis for classification by the Supreme Court in the case of *State Board of Tax Commission* v. *Jackson*, 283 U. S. 527. In the majority opinion in that case the Court declared:

> "The mass buying done by a chain store owner for a number of units selling the same goods is not comparable to the individuated purchasing of a department store for its grocery, its shoe, its truck, and each of its other departments. It is not to be expected that the management problems of stores, essentially separate and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a chain store owner operating an equal number of units all devoted to a single line of business."

The Supreme Court therefore has recognized the fact that a department store like Stewart's does not have the advantages which are claimed by counsel for defendant to be the basis for the classification. Since there is no basis for the classification the high tax rate imposed on Stewart's amounts to a deprivation of the equal protection to which it is entitled under the Federal constitution.

The purely arbitrary use of the multiplication table in fixing the varying rates of taxes above $400,000.00 is emphasized by the requirement that all sales of all stores and all departments associated under common management,

through stock ownership or otherwise, be aggregated for the purpose of determining sales volume. In other words, the rate of taxation is not based upon the volume of sales in a certain store or department handling related merchandise, but the sales made in one store or department are taxed at an ascending rate if, and solely because, the owner of that store or department owns other stores or departments. For example, the owner of a jewelry store is taxed on the sales of jewelry made therein at one rate, and if he also owns a retail coal store or automobile store, his jewelry sales are taxed at an entirely different rate. The tax in question forces the taxpayer to aggregate the sales of all enterprises in which he may have a controlling interest or which are under common management regardless of how dissimilar and unrelated the same may be. A merchant who owns or controls a candy store, a jewelry store and a piano store in three different cities having no relation to each other, one owned individually, one by stock control, and one as a co-partner, must nevertheless, aggregate the sales of all three for the purpose of taxation. There is no reasonable basis for such an arbitrary classification.

The illustrations are not fanciful. In the affidavit of Dann Byck (Stewart record 85) he says that Byck Brothers operate a store in Louisville and lease a department in the store of Wolf Wile Co. in Lexington, Kentucky. He says that whether the sales of this department are added to Wolf Wile sales or to the sales of affiant's Louisville store, the results are as follows:

> "If its sales are added to Wolf Wile's it will fall in the higher brackets and Bycks will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to the sales in Louisville then it increases Byck's sales and places it in a bracket where its tax approaches 1% and as a

> result this department would be subjected to a higher tax merely because Byck's operate a store selling a great many different items in a different city."

Byck Bros. & Co., Inc., is one of the parties protected by the restraining order. (Stewart record, page 246.)

The discriminatory features of the Act are further illustrated by the fact that Levy Brothers, who operate their business as a partnership, do not receive the deduction of corporation license fees which is given to merchants who operate in the form of corporations.

In the case of *Quaker State Cab Co.* v. *Pennsylvania*, 277 U. S. 389, the Court held unconstitutional a taxing statute which was imposed upon corporations operating taxicabs but exempted individuals so engaged. Such discrimination was denounced as *unusual*.

In striking down the tax the Court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. *The discrimination is not justified* by any difference in the source of the receipts or in the situation or character of the property employed. . . . . No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the State Court in this case, the section violates the Equal Protection Clause of the Fourteenth Amendment. (Citing authorities.) The tax cannot be sustained."

In the case of *Garysburg Mfg. Co.* v. *Pender*, 42 Fed. (2nd) 500, a three-judge Court held void a North Carolina statute for intentional discrimination between individuals and corporations in the matter of taxation upon shares of stock owned by them respectively in foreign corporations.

Thus discrimination *against* a corporation was held to violate the Equal Protection Clause. *A fortiori*, discrimination *in favor of* corporations against Levy Bros., a partnership, is not only *unusual*, but wholly unjustifiable.

Frost v. *Corporation Commission*, *278 U. S. 515.*

In this case Mr. Justice Sutherland said (p. 522):

> "A classification which is bad because it arbitrarily favors the individual as against the corporation, *certainly* cannot be good when it favors the corporation as against the individual."

A further example of the discrimination is referred to in the affidavit of Mr. Levy which appears in the Stewart record, page 81. Richman Brothers Co., a large chain store organization, maintains a store for the sale of men's ready-to-wear clothing in the City of Louisville. This store competes directly with the department in Levy Brothers handling similar items. The gross sales of the Richman Brothers stores does not exceed $400,000.00 and it would therefore be taxed in the lowest bracket. The competing department operated by Levys is taxed in a much higher bracket. Richman Brothers Co. does not own or operate any other store in Kentucky. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Brothers' business, and every advantage which Levy Brothers has in the conduct of its men's clothes department can be found to a much greater extent in the Richman Brothers Co. organization. In spite of this fact the rate of taxation on the Levy department is twenty times that imposed on Richman Brothers Co. When the deductions are considered the Levy Brothers' rate of taxation is forty times that imposed upon its competitor.

The Kentucky Gross Retail Sales Tax Bill, when introduced in the House of Representatives, bore the title which shows the intent and design of its sponsors when it recited,

as set forth in the Bill of Complaint, that it was an *"Act to Restrain the Unfair Competition of Chain Stores and in aid of individual merchants of the Commonwealth."* And it does not matter that the name or title by which it was known was afterwards changed. A person whose name is changed is the same person.

The Act as finally enacted was even more vicious than its name indicates inasmuch as the final Act discriminated, not only against chain stores, but against individual stores having large sales as well.

If there should be any uncertainty about the intent and design of this Act if we look merely at the Act itself, its meaning is made somewhat clearer when one reads the bulletins of the Kentucky Food Distributors Association, which sponsored the bill, shown on pages 93 to 95, Stewart record, wherein it is stated:

> "Our investigation has shown that very few independent retailers enjoy business in excess of $400,000.00. Our further investigation indicates that 92% enjoy a volume of less than $60,000.00, hence 92% of the Independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop Chains get by having to pay the maximum 1% under the sliding scale. We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.00."

And if there should still be any doubt that this Act was passed as a measure of discrimination against the plaintiffs, and a few similarly situated, and for the purpose of equalizing competition between the efficient and inefficient, the answer filed by the defendants in this cause should make it clear when they say, on page 63 (Kroger record):

> "Defendants further say that with the coming of the multiple owned stores, such as operated by this

plaintiff and others similarly situated, that such individual merchants are, in a large part, being driven from business."

The effect of this designed discriminatory feature is illustrated by the Kroger case. That Company operates 263 stores in the State of Kentucky. The yearly sales in each store average about $50,000.00. Each store competes with one or more neighboring stores having equal or greater sales. (See exhibits pages 134-147 Kroger record.)

The Kroger stores are required to aggregate their sales with the sales of all other stores in the State of Kentucky and as a result the highest rate of taxation is imposed on the Kroger stores. Its competitors, however, are not subject to such aggregation, and although each competes with a Kroger store subject to the highest rates of taxation, each of them pays only at the lowest rate. Practically all of them pay no tax at all because of the deductions allowed by the Act. The desire of the drafters to "wallop" one chain store organization in the State has been carried out by these two provisions.

The discriminatory feature which was referred to above in regard to the Kroger case is enhanced by the fact that many of the competitors are members of voluntary chains and as such members enjoy every benefit which units in the Kroger organization have. The Independent Grocers Alliance, commonly known as the I. G. A., has approximately ten thousand stores which is about double the number of stores operated by Kroger. (Kroger record 122.) A copy of the I. G. A. contract can be found in the Kroger record, page 129. This contract shows that the members of the voluntary association receive the same advantages in regard to quantity buying, cash discounts, skill in buying, warehousing of goods, uniform pricing and sales policies, turnover, unified advertising, standard forms of display,

superior and concentrated management and standardization as are received by members of Kroger organization.

The unified advertising is shown by the exhibits which appear on pages 187, 189, 190 and 191 of the Kroger record, referred to in the affidavit of John E. Donohue at pages 181 to 185 of the record. The exhibit on page 180 referred to in the affidavit of Gilbert Schneider appearing on page 163, is another illustration of common advertising.

On page 188 there is a picture of two competing stores, one operated by the Great Atlantic & Pacific Tea Company, a chain store organization, and the other by a member of the Independent Grocers Alliance. All members of the Independent Grocers Alliance have store fronts which are similar to the store front appearing on the left-hand side of the picture. The interiors of these stores are arranged along similar lines under the direction of supervisor sent out from central headquarters. (Record 152.)

In spite of the similarity, however, the A. & P. store which is pictured on page 188 pays a tax of 1% and its competitor has no tax to pay. (See figures in regard to Georgetown store Exhibits A and B, affidavit of John Donohue, record 185 and 186.) Exhibit B shows that any tax which would be imposed on this particular merchant would be wiped out by the deductions to which he is entitled under the Act.

As a last illustration of the discriminatory features of the Act, we wish to refer again to the audit of tax returns which appears in the Kroger record at page 100. The Kroger tax in Kentucky for 1930 is in the neighborhood of $113,000.00. The audit shows that 16,374 other merchants in the State would only have to pay a tax of $65,656.20. Kroger's tax therefore would be double that imposed by the Act on 16,374 competing merchants. The sales of these 16,374 competing merchants amount to $260,000,000.00. Kroger's sales in Kentucky are approximately $12,600,-

000.00. In other words, Kroger, with 3½% of the sales is required to pay almost double the tax paid by more than 16,000 competing merchants.

The Act complained of is of that type of legislation, prompted by ulterior motives, with which the Courts have often been required to deal and against which, but for the protection of the Fourteenth Amendment, the property of the nation would be very insecure. The inefficient business man who is unable to meet competition and prosper, often feels that the Government should be called upon to protect him from his efficient competitor, and instead of reforming his own methods so as to enable him to meet competition, seeks, through the force of Government, to destroy his efficient competitor.

Such legislation, designed to give some persons an advantage in competition over a less popular but more efficient person, violates sound economic law as well as principles of fundamental government. Strict adherence to the principle of free competition among the people of the Nation, and to the economic law of supply and demand is responsible, in great part, for our present industrial leadership among the nations of the world.

Our National and State Governments have considered free competition so vital to the welfare of our people that to foster, rather than to destroy, such competition, penal statutes, such as the Sherman Act, have been enacted for the very purpose of preventing any sort of interference with free competition, making it a very serious penal offense for the formation of any combination in restraint of trade and commerce.

In dealing with this question a notable professor of political economy stated that resolute self-reliance in overcoming economic difficulties seems to offer a safer solution than governmental favoritism to the inefficient. Tax and regulatory legislation has frequently been resorted to for the

purpose of equalizing competition between the wide awake and efficient and the indolent and inefficient, the legislatures disregarding entirely the economic loss to the State by such legislation. In one such case, *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, the late Mr. Justice Brewer said, at page 104:

> "Is it true in this country that one, who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits?" . . . . "Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services."

And in the same case the learned Justice quotes from what he calls the warning words of Judge Catron, afterwards Mr. Justice Catron of the Supreme Court, in *Vanzant* v. *Waddel*, 2 Yerger 260, 270, as follows:

> "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

Legislation of the kind involved in this Act is not new. An early type was the well-known ordinance adopted by

village councils aimed at peddlers or vendors of merchandise from house to house. To prevent these itinerant merchants from competing with and perhaps, in some instances, underselling the local storekeeper, the village council, generally composed in part, at least, of some of the village merchants, passed an ordinance assessing a license charge of $100.00 a day upon the itinerant merchant. And though the itinerant merchant, the peddler, was universally conceded to come within the provisions of the Police powers, and therefore subject to regulation and license, the Courts uniformly held that the license fee should not be any higher than what was reasonably necessary to pay the cost of regulation. So, under these decisions the exorbitant daily or weekly license fees were frowned upon by the Courts and, except in rare instances, have passed out of vogue. A few examples of legislation of this kind will be found in the following cases: *People, ex rel. Moskowitz,* v. *Jenkins,* 202 N. Y. 53, 94 N. E. 1065; *People* v. *Wilson,* 249 Ill. 295, 94 N. E. 141; *Ex parte Irish,* 122 Kan. 33, 250 Pac. 1056; *Campbell Baking Co.* v. *City of Harrisonville, Mo.* (D. C. Mo. 1927), 18 Fed. (2d) 159; *City of Duluth* v. *Rosenblum* (Minn. Sup. Ct.), 230 N. W. 830.

Another type of legislation designed to equalize competition between the efficient and the inefficient merchants, was the attempt to make it unlawful for merchants to give premiums with the sale of merchandise. This type of case will be found in *People* v. *Gillson,* decided in 1888 in the Court of Appeals of the State of New York, 109 N. Y. 399, 17 N. E. 343. In that case Judge Peckham, afterwards Justice Peckham of the Supreme Court, said:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community, against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own

against such competition and therefore flying to the Legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors."

A generation or so ago we had the anti-department store legislation. Merchants (using the language of Judge Peckham, *supra*), thinking it impossible to hold their own against the competition of the department store, attempted in two ways to drive the department store out of business. The first was, by prohibiting the department store from selling certain kinds of merchandise where certain other kinds of merchandise were sold; and secondly, by taxation which put the ordinary merchant in one class and the department store in another class, imposing no tax upon the ordinary merchant and a very onerous tax upon the department store. The first example of anti-department store legislation arose in the City of Chicago where an ordinance was passed which prohibited the sale of provisions in the same store where dry-goods, clothing or jewelry were sold. The Supreme Court of Illinois in 1899 held such legislation invalid. See *City of Chicago* v. *Netcher,* 183 Ill. 104. The second type of anti-department store legislation arose in Missouri. The legislature classified stores into two divisions, one employing fifteen or more persons and selling goods of more than one enumerated class, and the other employing less than fifteen persons. An onerous tax was assessed upon the large store, and no tax upon the small one. The Supreme Court of Missouri in *State, ex rel. Wyatt,* v. *Ashbrook,* 154 Mo. 375, 48 L. R. A. 265, declared such legislation unconstitutional, holding that the attempted classification was without reason and arbitrary and constituting, not a rightful regulation, but an undue restriction upon a business in the interest of others. This Court said:

"Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy

suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly classification run wild. It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this Act."

The Court of Appeals of New York, in the case of *People, ex rel. Moskowitz,* v. *Jenkins,* 202 N. Y. 53, 94 N. E. 1065, in declaring invalid similar legislation, said in the syllabus of the case:

> "A license tax passed to protect some class in the community against the fair, free and full competition of some other class, is not a valid exercise of the Police power."

And the Supreme Court of the United States, in the case of *Liggett Co.* v. *Baldridge,* 278 U. S. 105, at page 113, holding unconstitutional a statute aimed at chain drug stores, said:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

What are the rules that have been laid down by the Courts to guide us in determining, under the equal protection clause of the Fourteenth Amendment, just when an attempted classification in taxation is reasonable and not arbitrary?

The Courts have been quite careful to refrain from laying down any iron-clad rule which would solve all cases. *Bells Gap R. R.* v. *Penna,* 134 U. S. 232; *Citizens Telephone*

Co. v. *Fuller,* 229 U. S. 322; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Jackson* v. *State Board of Tax Commissioners,* 38 Fed. (2d) 652.

In the *Bells Gap case,* 134 U. S. 232, it is stated:

> "It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise."

In the *Louisville Gas Company* v. *Coleman case,* 277 U. S. 32, at page 37, the Court said:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases, as they arise, are to be considered."

Though the Courts have hesitated to lay down a rule which would solve every case, they have laid down certain general principles as a guide, which, if applied to the case at bar, bring us to the inescapable conclusion that the appellants, under the Kentucky Gross Retail Sales Act, have been denied the equal protection of the laws. Some of these rules are as follows:

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, at page 37.
>
> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the Courts under the Fourteenth Amendment unless they can see clearly that

there is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched." *Missouri R. Co.* v. *May*, 194 U. S. 267, at page 269.

"The equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him, or it, burdens and liabilities which are not cast upon others similarly situated. . . . . Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed." *Atchison, etc., Co.* v. *Matthews*, 174 U. S. 96, at page 104.

We grant that the power of the State to classify for purposes of taxation is of wide range and flexibility, providing, however, that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike, or, to state the proposition in a different way, a mere difference between the classes is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is imposed and can never be made arbitrarily and without any such basis. Discriminations of an unusual character are to be looked at quite carefully to determine whether or not they are obnoxious to the Fourteenth Amendment. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32.

The answer of the Attorney General attempts to justify the Act by saying that retail merchants are "classified by amount of annual gross retail sales." We examine the Act

and we find that all retail merchants are divided into eight different classes, as follows:

Class 1. Sales up to $400,000.00.
Class 2. Sales between $400,000.00 and $500,000.00.
Class 3. Sales between $500,000.00 and $600,000.00.
Class 4. Sales between $600,000.00 and $700,000.00.
Class 5. Sales between $700,000.00 and $800,000.00.
Class 6. Sales between $800,000.00 and $900,000.00.
Class 7. Sales between $900,000.00 and $1,000,000.00.
Class 8. Sales over $1,000,000.00.

Class 8, above, in which the complainants are placed, is nominally taxed, under the Act, twenty times as much as any merchant in Class 1 but is actually taxed by reason of the deductions as shown by the evidence, considerably more than twenty times as much as any merchant in Class 1, and yet all of complainants' competitors are in Class 1. The record also shows that there is only a handful of retail merchants in the whole State of Kentucky outside of Class 1, and that, by reason of the exemptions, practically everybody in Class 1, is not only tax exempt but that it was clearly the design and intent of the Legislature that they should be.

Though the complainants allege in their Bills that their business is no different in any respect from their competitors, and prove, by evidence, that there is no difference in the kind or quality of merchandise offered for sale or at the price sold between them and their competitors, and even show by evidence that the exterior of the stores of one of the complainants and its competitors are alike, the defendants do not offer a single bit of proof that there is any difference of any kind between the complainants as retail merchants and their competitors. The only difference claimed by the defendants is that the complainants have large sales and others have small sales. In the affidavits filed by the defendants of the three professors of Political

Economy, and we call the Court's attention to the fact that there is no other evidence filed by the defendants, no attempt is made on theory or in fact to show that there is any justification for the eight separate classes into which retail merchants are divided by this Act. The Professors, in their affidavits, classify retail merchants into two classes and only two. That is the large merchant and the small merchant, and there is no evidence before this Court on the part of the defendants to show that there is any reasonable difference between the class of merchants upon whom a tax of one-twentieth of one per cent is assessed, and between the class upon which a tax of two-twentieths of one per cent is assessed; or between the class upon which a tax of one-twentieth of one per cent is assessed, and upon the class upon which a tax of one per cent is assessed. The only classification shown by the defendants' evidence is, as stated above, the classification termed the small merchant, or the small scale operator, and the large merchant. The only classification attempted is that which was frowned upon and disapproved by the Supreme Court in *Cotting* v. *Kansas City Stock Yards, supra,* where the Court said, at page 103:

> "It appears that a classification is attempted between stock yards doing a large and those doing a small business."

It is submitted that if a classification of stock yards into those doing a large business and those doing a small business is unreasonable, and arbitrary, an attempt to classify retail merchants or grocers in such a manner would be equally unreasonable and equally arbitrary. Justice Holmes has stated the same principle, in *Engel* v. *O'Malley,* 219 U. S. 128, at p. 138:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and the small."

But the Attorney General says in his answer that the classification rests not only on the volume of gross retail sales, but also upon the ability of the merchant to pay the tax imposed because the per cent of income per dollar investment increases progressively in the same, or approximately the same ratio to the volume of sales as does the rate levied by the Act. In support of this attempted classification they offer the affidavit of Professor Martin, who says that large stores, chains and departments, operate more efficiently than small stores and therefore have a distinct competitive advantage and sell to the consumer at prices decidedly lower than those of the small scale competitor, and that by reason of, or as a result of, these advantages, which must certainly be free and open to everyone, the large merchant obtains a greater ratio of net gain to net sales than the small merchant. To prove this contention Professor Martin has attached to his affidavit two exhibits, Exhibit 1 and Exhibit 2. (Kroger record, p. 339.)

We examined these two exhibits of Professor Martin and we find on Exhibit 1 that the merchant doing $500,000.00 or less business, has a ratio of 2.8% of net gain to net sales, while the merchant doing from $500,000.00 to $2,000,000.00 has a ratio of 3% in net gain to net sales, and the merchant doing business from $2,000,000.00 up has a ratio of 5.2% of net gain to net sales. It is to be observed that this Exhibit relates to specialty stores, a line of business which has ordinarily a high ratio of net gain to net sales. If we should rest our case on this exhibit we do not find that the ratio of net gain to net sales is in any way proportional to the tax which would be levied under this Act upon the two classes of merchants. The merchant with less than $500,000.00 has a ratio of 2.8% of net gain to net sales, while the $2,000,000.00 and upward merchant has a ratio of 5.2% of net gain to net sales. The tax, however, on the smaller merchant is one-twentieth of one per cent, while

the tax upon the large merchant is approximately one per cent. Therefore, under Professor Martin's Exhibit No. 1, where the large merchant has less than twice the ratio of net gain to net sales as the small merchant, he pays twenty times the amount of tax assessed under this Act.

The exhibit of Professor Martin, No. 2, is more conclusive because there he deals with a ratio of net gain to net sales in department stores and he shows the department store with less than $150,000.00 in sales having a net gain to sales ratio of three per cent, and he shows the department store having sales up to $10,000,000.00 with a ratio of net gain to net sales of 3.9%. So in the instance shown on Professor Martin's Exhibit No. 2 the small merchant has approximately the same ratio of net gain to net sales, viz.: 3%, as against 3.9%, whereas the tax on the large merchant is approximately twenty times what it is on the small merchant. So the theory of the Attorney General, set up in his answers, that the tax increases on sales in the same ratio as net gain increases to net sales, is not supported by his own evidence, and it is absolutely and unqualifiedly contradicted by the evidence of the Kroger Co. which shows conclusively that it has never made a greater ratio of net gain to net sales than two to two and one-half per cent, while during the years 1929 and 1930 in the State of Kentucky it has actually suffered a loss.

But the Attorney General contends that even if the tax cannot be supported on the theory of the ratio of net gain to net sales, it can be supported on the theory of the ratio of net gain to net worth and supports this theory by Professor Martin's exhibits Nos. 3, 4 and 5. When we examine these three exhibits we find the following: Exhibit No. 3 shows that the smallest merchant makes a ratio of 2.7% of net profits to net worth, while the largest merchant shown makes a net profit of 3.2% to net worth. In other words, though the large merchant makes only about

one and one-half times as much on the ratio of net profits to net worth, the tax imposed is twenty times as much, which denies the Attorney General's contention that the tax increase in the several classes is in approximately the same ratio as the net profits are to net worth. In Exhibit No. 4 there are virtually two classes considered. This exhibit deals with specialty stores in which apparently, according to the learned Professor, there is a high ratio of net gain to net worth, the small merchant having a ratio of 6.5% and the largest merchant shown having a ratio of 14%. Here again we find, though the large merchant only makes a little more than twice as much on the ratio of net gain to net worth he pays twenty times as much in tax. Professor Martin, Exhibit No. 5, deals with department stores, showing that the smallest department store has a gain of 6.3% of its net worth, while the $10,000,000.00 department store has a gain of 8.1% of net worth. Here again there is no relation between the ratio of net gain to net worth in any way comparable to the increase in the tax. The Attorney General then further seeks to justify the tax on the theory that the large merchant pays a lower ratio of ad valorem taxes to sales than the smaller merchant, and supports this theory with Professor Martin's Exhibits Nos. 9, 10 and 11. We have examined these exhibits very carefully and cannot find where there is any marked difference in the ratio of taxes to sales between the large merchant and the small one, certainly no such difference in ratio approximating the difference in the tax which is sought to be justified.

The observations and figures set forth by the three learned professors are theoretical and are absolutely contradicted by the exact figures given by the appellants.

No sworn evidence of actual taxes paid by individual or small merchants as compared with this plaintiff's, has been submitted in evidence. However, in the verified Bill of

Complaint of the Stewart Dry Goods Company we find that Company with but $3,000,000.00 in sales has paid taxes of $80,000.00, approximately two and one-half (2½%) per cent of its volume of sales. Professor Martin, however, does not claim that the figures given by him in his exhibits showing the ratio of taxes paid to sales, are reliable. He says: "The table indicates clearly that, if information available is typical, the large merchant generally must pay less taxes, relatively speaking, than the small," and on page 335 (Kroger record) he says that "On the basis then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax paying ability than the small one, but in actual practice at the present time he *appears* to pay less tax in proportion to amount of business than does his already *handicapped* competitor."

An analysis of Professor Martin's testimony and his exhibits, shows that his tables are not only unreliable, but that, even if taken to be true, they do not, in any way, tend to substantiate the answer of the Attorney General, that the ratio of net gain to net sales, or the ratio of net gain to net worth, or the ratio of ad valorem tax to sales or to capital invested, between the large merchant and the small one, is in any way comparable to the ascending scale of rates applied in the Sales Tax Act. No attempt is made in the answer, or the evidence, of the defendants to show that there is any reasonable and just difference among the retail merchants of Kentucky supporting the attempted classification of such merchants into eight separate taxing groups, imposing an accelerating tax rate on each succeeding group in an arbitrary, disproportional, unreasonable and confiscatory manner.

The appellants in their affidavits, particularly in the affidavit of Mr. Lyons, a merchandising expert, and Mr. Bonham, a man of many years of practical experience in the grocery business, show that there is absolutely no relation

between net profits and gross sales. Ordinary common sense supports these statements, otherwise large sales would always mean large profits, when we know as a matter of fact that large business concerns meet with failure in just about the same proportion that small ones do, and Mr. Bonham's affidavit particularly states, from his years of experience, that he knows of nothing in the grocery business which would tend to make $400,000.00 a dividing line upon which to base anything, and that the tax based upon each $100,000.00 of sales above $400,000.00 is not based on any means or methods of classification or accounting known to the grocery business.

Not only is there no reason, except arbitrary selection, to start the rate of tax increase at $400,000.00 of sales and no reason to base the rate multiplication on each $100,000.00 of sales thereafter until the aggregate of all sales is $1,000,000.00, but, if ascending taxes are justified by ascending sales, there is not the remotest reason for stopping the rate of increase at $1,000,000.00.

The answers attempt to justify the classification set up in the Act upon the volume of sales and the rate imposed upon the merchants in the several classes as being in proportion to:

(1) The ability of each class to pay;
(2) The ratio of net gain to net sales;
(3) The ratio of net gain to net worth;
(4) The ratio of ad valorem taxes to sales.

Of course, one having greater property has the ability to pay more taxes than one having less property, but the ability to pay taxes of the one having more property is only proportionately greater. That is, one who has Ten Thousand Dollars of property has the ability to pay ten times as much taxes as one having One Thousand Dollars of property. The rates, however, fixed in this Act are not

in proportion to the ability of the several alleged classes to pay taxes, even if we do take as a matter of fact the theories of Professor Martin. If a merchant who has sales of One Million Dollars were required under this Act to pay ten times as much as one who had sales of One Hundred Thousand, the Act would be levying the tax in proportion to the ability to pay according to Prof. Martin's theory, but not in accordance with our facts, because "gross sales" have no necessary relation to earnings or invested capital. In the cases at bar, the tax levied is out of all proportion to the ability to pay. It is out of proportion to the ratio of net gain to net sales, even according to Professor Martin's tables. It is out of proportion to the ratio of net gain to net worth, according to the facts in the record. It is out of proportion to the ratio of ad valorem taxes to sales because, so far as the record shows, there are no facts before the Court to support the claim of the Attorney General that the large merchant should pay a larger ratio of ad valorem taxes to sales than the small merchant. And, anyhow, ad valorem taxes are assessed upon the value of taxable personal and real property and not upon sales.

It is apparent that the theory of classification and rates set up by the Attorney General is not sound, but is, in the words of Mr. Justice Pitney, illusory. The attempted classification and rates do not rest upon any ground of difference between the complainants and the several thousand merchants in the State of Kentucky with whom the complainants are competing, but the challenged Act is an attempt to impose an unjustifiable tax burden upon the complainants, exempting, at the same time, others in the same circumstances and in the same calling and business.

The equal protection clause of the Fourteenth Amendment has been invoked on matters of regulation and on questions of taxation. If a particular trade or business is subject to regulation under the police power it might be

more susceptible of refined classification than it would be in matters of taxation. But the ordinary business of retail merchandising has never been made the subject of general regulatory police measures, though some features of the merchandising business, such as the sale of oleomargarine, as referred to by the Attorney General, may be the subject of regulation. No attempt has ever been made, so far as we can find, wherein the entire retail business structure of the country has been brought within the regulatory power of the Legislature.

In *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, the late Chief Justice Taft said, at page 537:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher or the baker, the tailor, the wood-chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."

And Justice Hughes, now Chief Justice Hughes, said in *Truax* v. *Raich*, 239 U. S. 33, at page 40:

> "The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

and further, at page 41:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

A tax on large volume sales is after all an attempt to discriminate against business merely because of its size. This size may result because the quality, price or service characteristic of the business has attracted public patron-

age and large sales; or its size may result from its policy of selling a large volume of merchandise at low prices, and therefore requires large sales in order to make any profit. Whatever the reason, mere size does not justify discrimination. *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, the Court said:

> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In *Adams* v. *Tanner*, 244 U. S. 590, at page 594, the Court said that because abuses may and probably do grow up in connection with business, it is not enough "to justify destruction of one's right to follow a distinctly useful calling in an upright way." The Court said that there is no profession or business which does not offer an opportunity for reprehensible practice, and someone can always be found ready to maintain that its suppression would be in the public interest, but the Court said:

> "Skillfully directed agitation might also bring about apparent condemnation for any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

The above language is quoted approvingly in *Fairmount Creamery Co.* v. *Minn.*, 274 U. S. 1, in which the Court held unconstitutional a statute providing that any person in the business of buying milk who discriminated between localities in the state by purchasing at a higher rate in one locality than in another, should be deemed guilty of unfair

competition. In the course of the opinion, Justice McReynolds said at page 9:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil."

The late Justice Day in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, said:

> "Arbitrary selection, it has been said, cannot be justified by calling it classification."

And the Court of Appeals of Kentucky in the case of *City of Danville* v. *Quaker Maid, Inc.*, 211 Ky. 677, where a different tax was imposed upon regular service grocery stores than upon self-service cash and carry grocery stores, said:

> "The only difference between the business of appellee and that of the ordinary grocer is that appellee extends credit to no one and makes no deliveries. But this difference in this detail of conducting the business affords no reasonable ground for classifying appellee on a basis of taxation purposes different from that of the ordinary grocery store."

In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, at page 112, the Court said:

> "If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the

> guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above named."

In the case from which we have just above quoted an act, general in terms, but so framed as to apply only to the Kansas City Stock Yards, was held unconstitutional.

In this case the Court also said:

> "This statute is not simply legislation which, in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

It is plainly apparent that the Kentucky Retail Sales Act, just as in the Kansas City Stock Yards case, was aimed at a few large merchants taxing them at a high and confiscatory rate and exempting their competitors. No other conclusion can be reached when we realize, as shown by the uncontradicted record in this case, that Kroger alone is required to pay more than twice as much taxes on its sales of $12,000,000.00 than 16,374 retail merchants pay upon sales aggregating over $260,000,000.00, and when the record indisputably shows that 99.8% of all the retail merchants in the State of Kentucky, doing approximately 85% of the total retail sales pay only one-half as much taxes as one of the appellants is required to pay. To paraphrase the language of Justice Brewer in the Kansas City Stock Yards case, if such legislation does not deny the equal protection of the laws we are unable to perceive what legislation would.

Cases Relied on by Defendants.

The defendants rely chiefly on the following cases:

Clark v. *Titusville*, 184 U. S. 329;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283;
Metropolis Theater Co. v. *Chicago*, 228 U. S. 61;
Quong Wing v. *Kirkendall*, 223 U. S. 59;
Pacific Fisheries v. *Alaska*, 269 U. S. 269;
State Board of Tax Commissioners v. *Jackson*, 283 U. S. 527;
Forrest Moore v. *State Board of Charities*, 238 Ky. 243, 239 Ky. 729.

Clark v. Titusville, 184 U. S. 329.

The above case involved the constitutionality of a City Ordinance of Titusville imposing a license tax upon merchants in that city. It was an occupational tax in different amounts, measured by sales. The tax was graded downward from Five Dollars for a merchant who did a business of One Thousand Dollars, to One Hundred Dollars for a merchant who did a business over Sixty Thousand Dollars. There was an obvious attempt to grade the tax proportionately to sales so that every one would pay relatively a similar percentage. The graduation was not worked out with mathematical certainty but the net result was that the merchant with large sales paid a somewhat smaller sum in proportion to sales than a merchant with smaller sales. This inequality was incidental and there was no designed or intended discrimination such as exists in the cases at bar.

The Supreme Court held that the Ordinance did not conflict with the Fourteenth Amendment to the Federal Constitution because it was a license law, or to quote the language of the Court at page 334 "The tax in the case at bar is a tax on the privilege of doing business."

It should be noted that the City Ordinance involved in the Titusville case only imposed a small license fee which approximated the cost of inspection. While it costs more to inspect a large concern than it does to inspect a small concern, the percentage of the cost to the size of the business decreases as the business increases. The downward graduation of the tax constituted a recognition of this fact. Concerns with large sales were charged a greater amount in dollars than concerns with small sales, but large concerns were charged a lesser sum in *proportion* to sales than the small concerns. The proportionate difference between the amount charged concerns with large sales and concerns with small sales was slight—but a few hundredths of a per cent.

The fact that taxes assessed in the lower brackets under the Titusville ordinance are slightly higher in proportion than in the higher brackets may be accounted for in part by the rule of convenience and in part by the circumstance that proportionately the expense of collecting the tax in the lower brackets is much higher than in the higher brackets.

With these trifling differences in rate of taxation levied upon the various classes, the Supreme Court must have been mindful of the principle long before announced by it in the State Railroad Tax Cases, 92 U. S. 575 (612) which reads as follows:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations or the different classes of property subject to taxation, is a dream unrealized."

The courts have always refused to demand absolute mathematical nicety in adjusting the burdens of taxation and brushed aside the objections made to the tax in the Titusville case by saying (p. 331), that they were merely objections to classification by amount, and we have seen from the various opinions already cited that classification

by amount, *when the rule of arithmetical proportion is observed,* tends to avoid discrimination instead of creating it.

If we examine the Titusville ordinance as a whole, we will find that, taking the *average* of each class, instead of the extremes in each class, there is little if any departure from the principle of uniform gradation of the tax according to amount of business. In the lower brackets the license tax is a little bit higher in proportion than in the upper brackets, but, of course, as much expense for bookkeeping and collection is involved in a tax bill of $5.00 as in a tax bill of $100.00, and there is such a thing as reducing the rate of taxation to a point where it would net no revenue at all.

The authorities all indicate that the courts will not interfere merely to correct mathematical inaccuracies in fixing the basis of a tax or to correct accidental inequalities of taxation in particular cases.

There is a vast difference between a small tax of from Five Dollars to One Hundred Dollars, proportioned in accordance with the cost of inspection in an effort to assess the license fee equally, and a tax which practically exempts 99.8% of all retail merchants and assesses $113,000.00 on one merchant and $150,000.00 on another merchant.

There is a vast difference between a case where the Legislative Body, in its efforts to be fair and equal, graded a small license fee downward with some incidental inequalities, and the case at bar where the Legislative Body made a conscious effort to discriminate against lawful business.

The Titusville case is a typical case of a small license fee to pay the cost of inspection and regulation borne by all in equal proportions. The Gross Sales Tax Law was not designed as a license measure but as a tax weapon to "aid" some merchants at the expense of others.

Finally, there is a vast difference between proportionate graduation downward and disproportionate multiplication upward.

We do not question the right of the Legislature to enact a small occupational tax to meet the cost of regulating and inspecting retail business, and fairly proportioned in accordance with sales. We question the right of the Legislature to place an excessive and discriminatory tax on a few retail merchants in order to aid their competitors in the same general class who are practically exempt from taxation. The Titusville case cannot be expanded to cover the latter case and the decision is confined to the particular ordinance involved.

Magoun v. Illinois Trust, 170 U. S. 283.

The above case sustained a graduated inheritance tax law. Inheritance taxes stand apart from other taxes. The Court itself says, at page 288:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Again, at page 290, the Court says:

> "And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The Illinois inheritance law under consideration graded the tax on inheritances by the amount of the inheritance.

In justification of this provision Justice McKenna said, at p. 300:

> "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance."

There is no natural right to inherit. It is a privilege conferred by the State. The State may take all or such percentage of the inheritance by escheat or taxation as it chooses. Furthermore, a graded inheritance or estate tax has the further justification that it is based upon the ability of the taxpayer to pay the tax. The ability of a man who inherits more property or who has a large income, to pay higher rate of tax than a man with less property or less income, is the principal justification for graded income taxes. The Kentucky sales tax entirely disregards the ability of the taxpayer to pay the tax. As previously pointed out, a taxpayer with large sales may sustain a loss, while a taxpayer with much smaller sales may make a profit, nor are sales a measure of the amount of property owned by the taxpayer. The volume of sales may depend upon the character of the business and the number of times the capital invested in such business is turned.

While there is no natural right to inherit property, the taxpayers, in the cases at bar, have a natural, lawful and constitutional right to engage in their respective businesses in the State of Kentucky. They may not be deprived of that right by the State and the State is not free to condition that right as it chooses.

It can hardly be urged that inheritance taxes graded in accordance with ability to pay, and taxing the privilege of inheritance or succession, are a precedent for arbitrary and discriminatory revenue laws.

Metropolis Theater Co. v. Chicago, 228 U. S. 61.

The above case sustained a city ordinance of Chicago imposing a license fee on places of public amusement graded according to the price of admission, from $200.00 for theaters charging not to exceed twenty cents, to $1,000.00 for theaters charging one dollar or more. The legislation in question was strictly a license law enacted by the city pursuant to its police power. Theaters and public amusements have long been recognized as proper subjects for regulatory license laws and come clearly within the police power of the State to regulate places of amusement in the interests of the public health, safety, morals and welfare. Complaint was made that the classification was arbitrary. The Court said, at p. 69:

> "It will immediately occur upon the most casual reflection, that the distinction the theater *itself makes* is not artificial and must have some relation to the success and ultimate profit of its business. In other words, there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action."

The Chicago ordinance simply followed a classification which the theater business had itself adopted. Any theater, or place of amusement, was free under the ordinance, to fix its own price of admission and by so doing to determine its own classification for licensing purposes. As the Court well said, a classification which merely follows the classification adopted by the industry itself, and which leaves the taxpayer free to choose for himself which class he prefers to come under, cannot be considered arbitrary or unreasonable.

The classification adopted by the sales tax does not follow any known classification in any industry in Kentucky and the taxpayer has no choice, except to stop selling merchandise after his sales reach one or more of the arbitrary points at which the tax rate jumps or multiplies.

Quong Wing v. Kirkendall, 223 U. S. 59.

In the above case the Court sustained a Montana law imposing a license fee on hand laundries which did not apply to steam laundries. The Court said that the State could classify hand laundries separately from steam laundries. There was no discrimination between members of the same class. The Court went so far as to say that on the record it might be said that the State intended to adjust its revenue laws so as to favor hand laundries and to discourage steam laundries, just as the State may tax retail dealers and exempt wholesale dealers, or vice versa. However, the Court was careful to say two things: First, that the State may not make unreasonable or arbitrary discriminations even in carrying out a state policy and consequently, that if it were shown that the statute was actually aimed at laundries operated by Chinese the decision might be different. We quote this significant language from the syllabus:

> "On the record as presented in this case, and without prejudice to determining the question, if raised in a different way, the statute of Montana imposing a license fee on hand laundries does not appear to be unconstitutional. . . . Quaere: Whether this statute is aimed directly at the Chinese, in which case it might be a discrimination denying equal protection.
>
> When counsel do not bring the facts before it, the Court is not bound to make inquiries.
>
> Courts sometimes enforce laws which would be declared invalid if attacked in a different manner."

In the case at bar we have shown by factual evidence of record that the gross sales tax is aimed directly at chain stores and department stores and is a discrimination between retail merchants engaged in the same general class of business. If the facts are properly presented the Court will go behind the face of the law to ascertain its practical operation and effect. This was held in *Bethlehem* v. *Flynt*, 256 U. S. 421. In that case a North Carolina statute taxing automobile manufacturers $500.00 unless three-fourths of the entire assets of such manufacturer were invested in bonds of North Carolina or property situated therein, in which case the tax was reduced to $100.00, was held to work a discrimination between automobile manufacturers, contrary to the Fourteenth Amendment, and also to violate the commerce clause of the Federal constitution. The Court went behind the face of the law and based its decision upon its practical operation and effect.

In *Shaffer* v. *Carter*, 252 U. S. 37, the Court declared:

> "The constitutionality of such tax depends upon its practical operation and effect, not on mere definition or theoretical distinctions respecting its nature and quality."

We are at a loss to understand how a statute aimed at Chinese laundries, which the Court intimates would have been unconstitutional if the facts had been shown, aids the Attorney General in defending a tax law which the facts of record show is aimed at certain large retail merchants.

Pacific Fisheries v. Alaska, 269 U. S. 269.

This case involved an act of the Legislature of Alaska. Since Alaska is a territory, no question of equal protection under the Fourteenth Amendment could possibly arise in that case. The entire case was discussed by the Court on

the question of whether the Act amounted to a denial of due process. The Court held that it did not. The case has no bearing on the instant situation which involves the equal protection clause of the Fourteenth Amendment to the Constitution.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527.

This case is known as "The Indiana Chain Store Tax Case."

It decides one point—*and one point only*—that chain stores may be classified for taxation separately from department stores and other stores singly owned or operated in the same place and under the same roof.

There are many obvious differences between the Indiana law which was the subject matter of the Jackson case and the Gross Sales Tax Law which is the basis of this action. Here are some of the obvious differences:

First: The challenged Kentucky Act classifies merchants for taxation in Section 2 by volume of gross sales, some of whom are exempted by certain credits allowed by Section 4 from the burdens of the Act. Its *intended* and *actual* effect is to subsidize the unprogressive merchant having small sales, and to place upon the progressive merchant having large sales the whole burden of the tax anticipated from the law, thus taxing the latter for the benefit of the former.

The Indiana law is different. Under it, all owners of single stores are taxed alike, and all owners of multiple stores in the same brackets are taxed alike.

Second: The Indiana law classifies retail merchants according to the number of stores owned by them.

Wholly disregarding that principle, the challenged Kentucky Act taxes retail merchants according to the amount of gross sales made by them. Hence the conventional term "Gross Sales Tax Law," indicating a tax on sales, which

is equivalent to a tax on *property* sold, regardless of *earnings* or *profits* or *even collections* from such sales so taxed under the Kentucky Act.

Third: The rates of taxation under the Indiana law, with its classification of single-owned stores and multiple-owned stores, effect no such excessive or unreasonable discriminations as result under the Kentucky law.

Neither was it claimed under the Indiana law that the tax thereby imposed upon any or all of the chain stores was *per se* unreasonable or excessive. Indeed, it appears from the dissenting opinion in the Indiana case that the maximum tax imposed upon each store in any chain by the Indiana law was in itself moderate and not excessive.

The only point made on that score was that a decision upholding the law might possibly open the door to the enactment of future legislation levying excessive or oppressive taxes.

We quote as follows from the dissenting opinion:

> "It may be that here the maximum tax of twenty-five dollars for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the State to increase the amount to an oppressive extent."

Certainly the taxes imposed by the Indiana law do not effect any such discrimination or impose any such burdens as to shock the conscience like the taxes proposed to be levied upon the plaintiffs under the challenged Kentucky Act.

Fourth: An analysis of both the majority and minority opinion in the Jackson case shows that the Court was solely concerned with a chain store measure. The Court goes so far as to point out the difference between department stores (such as the Stewart Dry Goods Co. and Levy Bros.)

and separate stores conducted as a chain under common ownership and management.

On this point it says at page 536:

> ". . . . it is, nevertheless, evident that whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, *must after all consist of many separate types*, each devoted to a single store similar to an independent retail store. The mass buying done *by a chain store owner* for a number of units selling the *same goods* is not comparable to the *individuated* purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, *essentially separate*, and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a *chain store* owner operating an equal number of units all devoted to a *single line* of business."

This language used in the majority opinion might well have been taken from the affidavits of Mr. McKim and Col. Levy in their cases respectively, showing that in the matter of buying power, their respective department stores come into active competition with individualized specialty stores buying and selling a much larger volume of shoes or books or various other articles handled by a department store.

Thus the majority opinion is in fact as well as in effect an authority in support of the contentions made in this case by the Stewart Dry Goods Co. and Levy Bros. and other department stores similarly situated.

The minority opinion as well as the majority opinion shows that the Court was not concerned with a taxing measure which places substantially its burden upon thirty or forty taxpayers and practically exempting tens of thousands of other taxpayers engaged in exactly the same line of business, in exactly the same way but which have greater sales than the merchants who are subjected to the tax.

Neither the feature of the multiplying rate of taxation as provided in Section 2 of the Kentucky Act, nor the elements of exemptions as provided by Section 4 of the Kentucky Act, was presented to the Court in the Indiana Chain Store case.

(c) Appellants are entitled to an interlocutory injunction because the Act violates the commerce clause of the Federal Constitution in that it imposes a tax upon sales of foreign-grown farm products raised in Kentucky, and in that it has directly taxed the sale of products moving in interstate commerce.

The Act imposes a tax on sales of foreign grown farm products and exempts like products raised in Kentucky.

Section One of the Kentucky Gross Sales Tax law begins as follows:

> "The words 'retail merchant' as used in this Act shall mean and include every person, firm, association, co-partnership or corporation, owning, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, *except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State.*"

The Gross Sales Tax law applies to everyone who maintains a store for the sale of goods, wares and merchandise in the State of Kentucky, except storekeepers who sell

farm products raised by them in Kentucky. The clear intention of the Legislature was to exempt merchants who operated stores and sold in their stores farm products which are raised by them in Kentucky. This is clearly shown by the use of the word "*those*." This pronoun refers back to a preceding noun. The only noun to which it could possibly have reference is the word "merchant." Any other construction of this clause would render it meaningless, and the Court will not construe a Statute so as to render a portion of it meaningless. This is true even if such a construction would save the constitutionality of the statute, since such an action would amount to judicial legislation rather than construction. *Illinois Central R. R.* v. *McKendree*, 203 U. S. 514, at page 521.

The plain wording of the Statute shows an attempt on the part of the legislature of Kentucky to exempt storekeepers who sell farm products raised by them in the State of Kentucky, whereas, the same Act taxes storekeepers who sell farm products raised by them in other States. This amounts to a discrimination against the products of other States which is a burden on interstate commerce and is unconstitutional. Legislatures have frequently enacted similar laws but the Courts have held that to allow them to remain effective would permit the individual States of the Federal Union to erect barriers against the importation of products of other States. The present statute, if constitutional, would in effect permit the State of Kentucky to erect a tariff barrier against the importation of garden and farm products from other States.

In *Welton* v. *Missouri*, 91 U. S. 275, the Court held unconstitutional a statute of that State which required the payment of a license tax from persons who dealt in the sale of goods, wares and merchandise which were not the growth, produce or manufacture of the State of Missouri. No license tax was required from persons selling goods in

a similar way which were the growth, produce or manufacture of the State of Missouri. The Court pointed out in its opinion that if the goods of the outside States could be subjected to special restrictions by the legislature of Missouri, the object of investing control over interstate commerce in Congress by the Constitution of the United States would be entirely defeated.

A similar situation arose in the case of *Guy* v. *Baltimore*, 100 U. S. 434. The syllabus of that case reads as follows:

> "A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden or tax than upon like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them."

In 1875 the State of Michigan passed a statute which imposed a tax upon persons who, not residing in or having their principal place of business within that State, engaged there in the business of selling intoxicating liquors, to be shipped into the State from points outside of the State. A similar tax was not imposed upon persons selling similar products manufactured in the State. The statute was declared unconstitutional in the case of *Welling* v. *Michigan*, 116 U. S. 446. At page 454, the Court said:

> "If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri*, 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth,

product, or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott*, 8 Wall. 148; *Ward* v. *Maryland*, 12 Wall. 418; *Guy* v. *Baltimore*, 100 U. S. 434, 438; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Webber* v. *Virginia*, 103 U. S. 344.

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States. . . . . We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Welton* v. *Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631."

The Court in its opinion refers to the case of *State* v. *North & Scott*, 27 Mo. 464, with approval. In that case the Supreme Court of Missouri held unconstitutional a taxing statute in which the language of exception was similar to the language involved in the instant case. The tax in that case was upon merchants for all goods purchased by them, except such as were grown, produced or manufactured in the State of Missouri.

Again, in *Webber* v. *Virginia*, 103 U. S. 344, the same problem was dealt with by the Supreme Court of the United States, and the Court again held that a state statute which discriminated against products of other states was unconstitutional. After referring to the statutes involved, the Court, at page 350, declared:

"By these sections, read together, we have this result: the agent for the sale of articles manufactured

in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. *It matters not whether the tax is laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states.*"

The fact that the instant case deals with garden or farm products rather than manufactured articles does not effect the rule, and in a recent case, *Ex parte Smith*, 128 So. 864, the Supreme Court of Florida dealt with an ordinance which discriminated against dairy, poultry and farm products of other States, in favor of similar products of the State of Florida. The Court held that the ordinance was unconstitutional. The syllabus in that case reads as follows:

"A town ordinance requiring 'each and every person, firm or corporation,' selling or delivering mer-

chandise by truck, and who does not conduct and pay a license upon an established business in the town, to pay a designated license tax, but exempting from the operation of the ordinance, dairy poultry or farm products, raised, grown, or manufactured 'within the State of Florida,' but not elsewhere, held, invalid as a denial of equal protection and an abridgement of the privileges or immunities of citizens of other states, contrary to the Fourteenth Amendment of the Federal Constitution, as well as to Section 2, Art. 4 thereof."

In that case the ordinance applied to every person selling goods by means of a truck or other vehicle. It did not apply to farmers who did not sell by truck. The provision in regard to farm products raised outside of the State of Florida, was given the meaning intended by the legislative body and rendered the whole ordinance unconstitutional. In the same way, the exception in the Kentucky Act must be given the meaning intended for it by the legislature, and its presence in the statute renders the law unconstitutional as an interference with interstate commerce. A difference in the place of production or origin affords no ground for discrimination in revenue measures. An act or ordinance which attempts to make such differences is void.

In the instant case The Kroger Grocery and Baking Company operates a farm in the State of Ohio. This farm consists of three hundred and seventy acres and is named "Country Club Farm," after the "Country Club" brand, which is one of the best known of the Kroger brands. The plaintiff in the instant case raises and produces on this farm cattle, sheep, hogs, poultry, milk and other garden and farm products which are sold at retail in the Kentucky stores. See affidavit of John B. Bonham, Kroger record 126; affidavit of Albert C. Huneke, Kroger record 221; affidavit of Francis Baliard, Kroger record 224; affi-

davit of Rufus Blume, Kroger record 225; affidavit of O. W. Vaughn, Kroger record 226.

On page 227 of the Kroger record appears the affidavit of John C. Schwartz, who is connected with the Gray-Von Allmen Sanitary Milk Co. which sells milk in the City of Louisville, and who states that that corporation operates a dairy farm at La Grange, Kentucky. This milk is sold by the corporation with which he is connected, in a retail establishment in Louisville, Kentucky. By virtue of the fact that the corporation, with which Mr. Schwartz is connected, maintains this farm in the State of Kentucky, it is exempted from the operation of the Gross Sales Tax Law. Kroger, on the other hand, although it produces similar products, is subject to the tax for the mere reason that its farm happens to be in the State of Ohio rather than in the State of Kentucky.

Such a tax has been condemned by the courts in the decisions cited above, and in numerous other cases. See *Minnesota* v. *Barber*, 136 U. S. 313; *Boyce* v. *French*, 293 Fed. 43; *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421; *New York State* v. *Roberts*, 171 U. S. 658; *Ward* v. *Maryland*, 12 Wall. 418; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Brimmer* v. *Rebman*, 138 U. S. 78.

The farm products sold by the Kroger Company and by Kentucky storekeepers falling within the excepted class may only be a small part of the total merchandise sold by these companies, but the exception applies to those who "*actually*" engage in gardening or farming, and was obviously intended to secure the votes of the rural members of the legislature who were thereby assured that farmer-storekeepers would not be subject to taxation. The law does not limit the exception to those "solely" or "extensively" or even "substantially" engaged in gardening or farming, but excludes from the definition of retail merchant, hundreds of small storekeepers throughout Ken-

tucky who operate farms and sell some of their products in their stores. This exception is an integral part of the legislation under consideration. It is part of the definition of the class subject to taxation. The gross sales tax law would not and could not have been passed unless the farmer-storekeeper group were excepted from the act. Under these circumstances the exception cannot be separated from the balance of the act, and the entire act must necessarily fall. This is directly held in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. In that case the Illinois anti-trust act contained the following:

> "Section (9) The provisions of this act shall not apply to *agricultural products or livestock while in the hands of the producer or raiser.*"

The Court distinguished *Magoun* v. *Illinois* and *American Sugar Refining Co.* v. *Louisiana*, and held that the above agricultural exception from a law applicable to a general class was "not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates (page 563)." The Court then took up the question whether the above section of the law could be eliminated and leave the rest of the act in operation. The Court says, at page 565:

> "The first section of the act here in question embraces, by its terms, all persons . . . . while the ninth section declares that the statute shall not apply to agriculturalists or livestock dealers in respect to their products or stock in hand. *If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock dealers.* Those classes would in that way, be reached and fined, when, evidently, the legislature intended they should not be regarded as offending against the law . . . . Looking, then, at all the sections together, we must hold that the legislature would not have entered upon

> or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its operation . . . . *The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.*"

If the exception in favor of farmer-storekeepers is stricken from the Sales Tax then the Act will apply to such group. This was contrary to the intention of the Legislature and the entire act must fall with the exception. The Court cannot tax a large class or group of storekeepers whom the legislature did not intend to tax and specifically excepted from taxation.

The Act directly taxes the sale of products moving in interstate commerce.

Apart from the fact that the Kentucky Gross Sales Tax Law discriminates against products raised in States outside of Kentucky, the tax violates the interstate commerce provision because it is a direct tax on sales of articles moving in such commerce.

In the case of *Cook* v. *Pennsylvania*, 97 U. S. 566, the Supreme Court held that a tax on the sale of goods was equivalent to a tax on the goods themselves. In the instant case, the Gross Sales Tax Law must be considered as a direct tax on the goods sold by the merchants who are obliged to pay the tax.

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, the Supreme Court, in upholding a tax levied on net income from sales to customers outside the state, said that it would be unconstitutional if applied to *gross* income. The Court said, at pages 328-329:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, rec-

> ognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that it is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profits has not the same deterrent effect since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property . . . ."

The Kroger Company makes purchases in many States of the United States in order to supply its trade in the State of Kentucky. This merchandise includes a variety of food products. Many of these purchased articles are sold in the original packages and containers in which they are packed for shipment. Many of the items sold by the appellant in the Kentucky stores are sold to non-residents, living across the state lines, and this is especially true in those cases where the stores are near the borders of other states. (See affidavit of John B. Bonham, Kroger Record, page 125.)

Meat is delivered to the Kroger stores from packing plants outside of the State of Kentucky. It is unwrapped at the time of shipment and it is sold at the stores in exactly the same condition in which it is shipped. (See affidavit of Albert C. Huneke, Kroger Record, page 221.) The same is true of milk which is shipped and sold in the same bottles. See affidavit of Rufus Blume, Kroger Record, page 225.)

In the affidavit of Robert J. McKim, Stewart Record, page 80:

> "Stewart's trade is not confined to the city of Louisville but attracts customers from all nearby cities in this and other states . . . . . A substantial volume of Stewart's sales are made in interstate commerce to customers in other states buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other states.
>
> *Stewarts has over 2,000 regular accounts with persons residing in the state of Indiana alone,* and numerous charge accounts with persons residing in states other than Kentucky and Indiana.
>
> Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, *Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.*"

In *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421, at page 426, the Court said, relative to a tax on an agent of automobile manufacturers for the sale of automobiles in North Carolina:

> ". . . . their second contention is that the act is an attempt to regulate interstate commerce. If it have that effect it is illegal, for a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and, if the product be that of another state, it is a tax on commerce between the states. *Welton* v. *Mo.*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344; *Darnell & Son* v. *Memphis*, 208 U. S. 113."

The court said this was denied on the ground that the automobiles had passed out of interstate commerce and

had come to rest within the state. In overruling this claim Justice McKenna said, at the bottom of page 426:

> "The basis of the denial and its support by the Supreme Court, is that the automobiles had passed out of interstate commerce and had reached repose in the state and blend with other things of the state, and become subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the court that the automobiles were in the hands of the agents of the consigning corporations, and therefore, a tax against them was practically a tax on their importation into the state. It is not necessary to say *it would be useless to send them to the state if their sale could be prevented by a prohibitive tax or one so discriminating that it would prevent competition with the products of the state* . . . . . The imposition of such a tax is practically the usurpation of the power of Congress over interstate commerce and therefore illegal."

The decision of the Supreme Court in *Crew Levick Co. v. Commonwealth of Pa.*, 245 U. S. 292, is directly in point. That case involved a flat sales tax of one mill "on each dollar of the whole volume, gross of business transacted annually." Each dealer or vendor of goods and any board of trade was assessed a tax of 25c on each $1,000 worth, gross, of goods so sold. The court declared that such a tax applicable to goods sold in interstate commerce was unconstitutional and said, at page 297:

> "*It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions.* That it applies to internal as well as to foreign commerce, cannot save it; for, as was said in the case of *State Freight Tax*, 15 Wall. 232, 277, 'The state may tax its internal commerce but if an act to

tax interstate or foreign commerce is unconstitutional, *it is not cured by including in its provisions subjects within the domain of the state.*' "

We submit, therefore, that the Kentucky Gross Sales Tax law is unconstitutional for the reason that it violates the provisions of Article One, Section Eight, of the Constitution of the United States, and is an attempt to burden and interfere with interstate commerce because it taxes articles in interstate commerce directly, and because it discriminates against products grown in States outside of the State of Kentucky, in favor of similar products grown in the State of Kentucky.

(d) Appellants are entitled to an interlocutory injunction because the Act is confiscatory and constitutes an attempt to take the property of the appellants without due process of law.

The Kroger record shows that that company commenced business in Kentucky more than thirty years ago and has continued to invest capital there ever since. In 1897 it had one store—in 1899, three stores—in 1905, eight stores. In the intervening twenty-five years additional stores have been established frequently "in response to request on the part of citizens requesting the establishment of such store in their community." At the present time, Kroger has two hundred and sixty-three separate stores in various localities. Kroger has only one store in each of some fifty-five different towns. In the course of building its business, Kroger has made large investments in Kentucky in store fixtures, store equipment and in improvements to leaseholds. It owns a large warehouse in Louisville. It owns transportation equipment, merchandise of various kinds, etc. During the past thirty years Kroger has also invested large sums in intangible items, such as advertising in posters, placards, newspapers and other publications in

order to develop customer good will and patronage. Its investment in Kentucky in tangible items alone, exclusive of intangible items, exceeds a million and a half dollars. This does not include capital employed outside of Kentucky for the administration and conduct of its business in Kentucky.

This investment in the development of its business in Kentucky has been made on the faith of the right granted to the Kroger Company when that corporation was lawfully admitted to do business in Kentucky and qualified by complying with all the laws of Kentucky relating to foreign corporations doing business therein. On the faith of the right granted it to do business in Kentucky, the Kroger Company has entered into commitments and obligations under written leases, which have many years to run, for stores and warehouses, and upon which the Kroger Company is liable for rent during the term of such leases. The sum expended for rent in Kentucky in 1929 was $342,000.00; for salaries to employes $1,454,000.00; for the purchase of merchandise in Kentucky $2,338,000.00 and for transportation and truck operations $314,000.00. The question now arises whether the defendant can continue its business without irreparable loss under the confiscatory terms of the challenged Act.

There is nothing in connection with the Kroger business which is in any way injurious to the public health, morals, safety or welfare. On the contrary, Kroger stores have always been a credit to any community where they are located and the evidence shows, without contradiction, that the conduct of its business has been of benefit to the public. We quote from the affidavit of Mr. Bonham, Kroger Record, page 126:

> "Kroger has consistently maintained a policy of having its stores bright, attractive in appearance, and

maintained in strict conformity with all of the sanitary and health regulations with respect to the sale of food, produce and milk. The sale of good foods under sanitary conditions, prepared, processed and kept in conformity with approved health regulations, is beneficial to the public welfare and public health. . . . . The basis upon which Kroger has built its business by selling at low prices and relying upon a large volume of sales for a profitable return upon the value of its business, is of great benefit to the consuming public. It has enabled the public to obtain food at the lowest possible prices. It contributes to eliminate waste in distribution and Kroger in many instances distributes food in direct line from the producer to the consumer. This results in the most efficient and economical distribution of foods, meats, dairy and farm products, which economical and efficient distribution of food supplies is of great public benefit. . . . . Kroger disposes of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume. This rapid turnover assures the sale of fresh goods to the consuming public. In the food business this is particularly important and this method of conducting business has been of great value to the consuming public, because it prevents stale stock, stock wastage and stock spoilage."

The public benefits from the operation of a business like Kroger are explained in the affidavit of Mr. Lyons (Kroger Record, page 107). He said:

"Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. . . . . The 'chain stores' have been conspicuous in developing distribution on a large volume and a low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has

> necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited."

Here we have a large business enterprise, contributing to the welfare of the public and the state, with 16,000 stockholders, whose money has been invested therein, which is suddenly made, to quote the language of the *Cotting case*, the victim of the legislative scalping knife. This scalping process cannot be justified under the police power, and takes the property of the complainant without due process of law in order to "aid" its competitors.

The Act does not purport to be an exercise of the police power. Although it is referred to in one section as a "license" law, the Act contains no provision for either obtaining or issuing any license. The Act contains no provision for the inspection of any retail business. It contains no provision for the regulation of any retail business. No standards for the conduct of retail business are included in the Act. There is nothing throughout the entire thirteen sections which is intended or designed to curb or protect the public against any evils which may inhere or be anticipated in the conduct of any retail business, chain store, department store or otherwise. The class subject to taxation is all retail business of every kind. The Act applies to every storekeeper selling at retail, except storekeepers selling farm products raised in Kentucky. Of course, some storekeepers may be guilty of improper practices but that does not justify a general dragnet applying to good and bad alike. The Supreme Court has held in numerous decisions that such laws are not a proper exercise of the police power. *Tyson & Brother* v. *Banton*, 273 U. S. 418, 429-30; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 537-8; *Truax* v. *Raich*, 239 U. S. 33, 43; *Fairmont*

Creamery Company v. *Minnesota*, 274 U. S. 1, 9; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111. In the *Liggett case*, the Supreme Court, per Sutherland, J., said at page 111:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of public health?"

At page 113, the court said:

> "The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (Citing cases.)

The Court, at page 113, said that the mere stock ownership of a corporation, owning a drug store, could have no real or substantial relation to public health, and that the act created an unreasonable and unnecessary restriction upon private business, saying:

> "No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. *It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered*

pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

Furthermore, the fact that Kroger is required to pay $113,000.00 shows that the tax is not a license law and has no relationship to the cost of inspection or regulation, but is purely a revenue measure. Indeed, it is only fair to the Attorney General to state that he does not attempt to justify the measure as an exercise of the police power and frankly conceded in the course of the oral argument that the sales tax was not an exercise of the police power, but must be justified, if at all, as a revenue law.

The confiscatory effect of the Act upon the lawful business of the Kroger Company is clearly shown by the evidence in the record. Kroger has built its business on the policy of selling food to the consumer at the lowest possible price. This can only be done by accepting a small margin of profit and selling a large volume of merchandise. The margin of profit has steadily narrowed during the past decade, and particularly during the past five years, owing to the keen competition in the grocery business. There is not only competition with individual merchants but keen competition between chain stores and with large co-operative associations and with the powerful wholesale—retail group. The affidavit of Mr. Bonham (Kroger Record, page 123), shows the following for the past four years:

"The combined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows:

SALES	AVERAGE NET PROFIT
1926—$146,009,373	.0288
1927— 161,299,604	.0271
1928— 207,373,551	.0257
1929— 284,953,448	.0223"

Since the filing of said affidavit, the certified public accountant's audit for the year 1930 has been completed and published. This audit shows the net profit of the Kroger Company on the combined sales of all stores for 1930 was only eighty-one hundreds of one per cent (.81%) per dollar of sales. Mr. Bonham states that owing to economic and competitive conditions in Kentucky the company sustained a loss on Kentucky business during the years 1929 and 1930. The experience of the Kroger Company is in line with the general experience of such companies, as shown by the affidavit of Mr. Lyons (Kroger Record, page 108), who says:

> "In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatisfactory merchandise and the fact that such merchandise represents a substantial volume which is necessarily deducted from gross sales, thereby inevitably modifying the percentage above given. *In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.*

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large

> proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66 2-3% of all the net earnings of stores falling within the above averages."

It may be argued that a general sales tax could be shifted to the consumer so that it would not be confiscatory. Whatever merit this argument may have if the tax is laid equally upon all merchants in the same business or class, it has no merit when some are subject to a heavy tax and others in direct competition are not subject to any tax. Competition prevents merchants who are subject to heavy taxes from raising prices to the consumer because in such event trade would go to their competitors, who are not forced to raise prices. Furthermore, the retail price of many products is fixed by advertising and interstate competition so that in practice it is impossible for a retailer to charge prices out of line with prices generally charged for like merchandise. A glaring illustration is the fact that Levy Brothers in Louisville, who are subject to heavy taxes, compete directly with Richmond Brothers, who, because they have only one store in Kentucky, are subject to no taxes. Richmond Brothers have a greater buying power and larger sales generally than Levy Brothers, and it would be impossible for Levy Brothers to raise the price of clothing in face of such competition. For these reasons, Mr. Lyons says (Kroger Record, page 109):

> "Such a tax would necessarily come out of earnings, and frequently out of capital, and would be prohibitory and confiscatory on retail grocery store and department store enterprises."

The affidavit of Mr. Bonham shows that it is impossible to successfully operate an average grocery store if that store is required to pay a tax of $430.00 per store, in addition to all other license fees and ad valorem taxes, and that

a 1% tax on gross sales will actually increase the operating expense of a Kroger store approximately 5½%. Mr. Bonham states that the Kroger Company would have to pay the sales tax out of capital or close a sufficient number of stores to bring the tax within the lower brackets of the Act. By reason of the lease obligations of the Company, it faces irreparable losses whether it attempts to operate under the sales tax law or close stores which cannot be profitably operated.

The Kentucky sales tax confiscates the entire profit of the Kroger Company and actually turns the profit which it is now making on its general business into a loss. This is graphically shown by the following chart:

EFFECT OF KENTUCKY SALES TAX ON PROFITS OF CONCERNS WITH VARYING GROSS SALES AND AT VARIOUS PROFIT RATES.

Amount of Sales	Total Tax Payable	Net Profit of ½ % Before Tax	Net Profit of ½ % After Tax	Net Profit of 1 % Before Tax	Net Profit of 1 % After Tax	Net Profit of 1 ½ % Before Tax	Net Profit of 1 ½ % After Tax
$400,000	$200	$2,000	$1,800	$4,000	$3,800	$6,000	$5,800
500,000	300	2,500	2,200	5,000	4,700	7,500	7,200
600,000	550	3,000	2,450	6,000	5,450	9,000	8,450
700,000	950	3,500	2,550	7,000	6,050	10,500	9,550
800,000	1,500	4,000	2,500	8,000	6,500	12,000	10,500
900,000	2,200	4,500	2,300	9,000	6,800	13,500	11,300
1,000,000	3,050	5,000	1,950	10,000	6,950	15,000	11,950
2,000,000	13,050	10,000	3,050*	20,000	6,950	30,000	16,950
3,000,000	23,050	15,000	8,050*	30,000	6,950	45,000	21,950
4,000,000	33,050	20,000	13,050*	40,000	6,950	60,000	26,950
5,000,000	43,050	25,000	18,050*	50,000	6,950	75,000	31,950
10,000,000	93,050	50,000	43,050*	100,000	6,950	150,000	56,950
15,000,000	143,050	75,000	68,050*	150,000	6,950	225,000	81,950

* Loss.

The above table shows that a business which makes a net profit of one-half of 1% before the tax will sustain a loss of $3,050.00 on $2,000,000.00 of sales after paying the tax and a loss of $43,050.00 on $10,000,000.00 of sales after paying the tax. In 1930 Kroger only earned eighty one hundredths of one per cent profit on its entire gross sales, before the tax. If it is compelled to pay the tax this profit will be turned into a loss. Even if Kroger was able to earn 1% on its gross sales, a fair margin for its business, the

above table shows that its profit would be $6,950.00 on sales of $1,000,000.00. *The table further shows the startling fact that no matter how much it increased its sales above* $1,000,000.00 *on a 1% profit basis, it could not earn one cent over* $6,950.00. No stronger indictment of the sales tax can be written than the figures contained in the above table. A merchant has a constitutional property right to expand his business. Business cannot stand still. It must either go forward or fail. The sales tax places a steel girdle or straight-jacket around large retail business in Kentucky, which effectually prevents such business from expanding and growing.

This is illustrated by the business of Byck Brothers. (Affidavit of Dann Byck, Kroger Record, page 260.) Byck says:

> "Our records show that we make 1% profit for each dollar of sales. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store of our type . . . . . Today the establishment is doing about $700,000.00 worth of business annually and is giving employment to one hundred people. Our growth is due to the adoption of efficient merchandising methods and we would be discarding these methods if we attempted to secure a larger profit than we are making. . . . If we increase our sales the per cent of profit to sales will not increase but the tax would. For example, let us assume that through intense effort and application we are able in 1930 to increase our business an additional $100,000.00, on which we would earn on a 1% basis a net profit of $1,000.00. Under the confiscatory terms of this tax $700.00 of this $1,000.00 profit would be taken. If we gain another $100,000.00 volume and its accompanying $1,000.00 profit, $850.00 of this additional $1,000.00 profit will be taken as tax. . . . . If we are able to reach our goal of $1,000,000.00 by adding another $100,000.00 volume, the entire $1,000.00 profit derived from this increase will be taken as additional tax."

The Supreme Court has said that the Fourteenth Amendment protects property rights against such unlawful destruction. *Liggett Co.* v. *Baldridge*, 278 U. S. 105.

In *Northwestern National Insurance Company* v. *Lee*, 49 Fed. (2nd) 274, the Court held that the imposition of a license fee of $500.00 for each additional agent who participates in the effecting of insurance as a solicitor or broker, or otherwise, is an unreasonable and unconstitutional interference of the right of a foreign fire insurance company to transact business when domestic companies were only required to pay $2.00.

The order granting an interlocutory injunction in that case was affirmed by this Court, 284 U. S. 590.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the Court held that even private schools had a property right in such business which could not be destroyed by an Oregon act requiring parents to send their children to public schools.

It must be remembered that we are dealing in this case with a tax which takes 1% of the sale price of every article sold by the appellants and takes practically nothing from the sale price of a vast majority of its competitors. This is done for the avowed purpose of aiding its competitors. In other words, the legislature proposes to take the property of the appellants in such a manner and in such a large amount that it would be beneficial to the interests of appellants' competitors. Such action is clearly an attempt to take the property of the complainants in violation of the Federal Constitution.

Kentucky Cases.

On the point of the confiscatory nature of the tax it is interesting to note the Kentucky decisions.

Where jurisdiction exists in the Federal courts to hear and determine a controversy, it has been held that the Court will proceed to determine the whole case, including any

rights asserted or questions raised under the constitution and laws of Kentucky. *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175-191; *Ohio Tax Cases*, 232 U. S. 576-587; *Greene* v. *L. & I. R. R. Co.*, 244 U. S. 499; *Texas Co.* v. *Brown*, 258 U. S. 466; *Risty* v. *C. R. I. & P. Railway Co.*, 270 U. S. 378-387.

We have previously set forth the evidence showing that the tax imposed upon Kroger takes more than its entire profit on all of its sales for the year 1930 and turns such profit into a loss. The evidence also shows that over a five-year period from 1926 to 1930, Kroger has only earned a little over two per cent on its gross sales from all its business. It actually lost money on its Kentucky business during the last two years. There has been a steady decline in the percentage of earnings of the company, although its sales have increased. On the basis of an average for the past five years the one per cent sales tax would have taken practically one-half of all Kroger profits. Its actual effect, since its enactment, has been to take all of its profits during 1930 and to compel the company to pay out of capital twenty-nine (.29) hundredths of one (1%) per cent of its gross sales.

The Court of Appeals of Kentucky has repeatedly held that a tax which lays so oppressive a burden upon lawful business, violates section 181 of the Kentucky constitution and the Bill of Rights of the State of Kentucky.

In *Louisville* v. *Pooley*, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582, the Court held unconstitutional an ordinance of the City of Louisville which was passed in order to put people whose occupation was lending money on salaries, out of business. The Court declared that the imposition of a license tax upon the business of lending money on salaries and chattels which equals eighty (80%) per cent of the average earnings of all persons engaged in such business is so unreasonable, oppressive and prohibitive as to be void.

In the case of *Fiscal Court of Owen County* v. *Cox, Court of Appeals of Kentucky,* 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83, the Court held unconstitutional a license tax on wagons. Syllabus 3 of the case reads:

> "A license tax on a four horse wagon used for hauling freight for hire, which is nearly three times as much as that imposed on three horse wagons, is void for discrimination."

In the body of its opinion the Court declared:

> "It may be conceded that, ordinarily, the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall* v. *Com.*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing cases.) While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000.00, or imposing upon every merchant a license of $5,000.00, or upon every washerwoman a tax of $1,000.00 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations; *but*

> *what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax?* Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that *among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life, and the right to acquire property; and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation,* the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. *Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution.* As the evidence in this case shows that the license tax in question is *prohibitive, we have no hesitancy in declaring it invalid.*"

In the case of *Sallsbury* v. *Equitable Purchasing Co.*, 177 Ky. 348, L. R. A. 1918 A 1114, the Court held unconstitutional a license tax upon the business of lending money on salaries. The syllabus of the case reads:

> **"A license tax upon the business of lending money on salaries which is equal to one-third of the net earnings of the largest business of any individual engaged in such occupation, is prohibitive and therefore illegal."**

At page 353 the Court said:

> "When it is admitted, as is done here, that the license fee exacts practically *one-third of the net earnings* of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression, necessarily created, that the license is prohibitive and therefore illegal."

Concluding, the Court says, at page 355:

> "In short, we hold that no municipality, under a free government like ours, has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

In the case of *Hagar* v. *Walker*, 128 Ky. 1 (9), the Court declared:

> "Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it should be so unreasonable or arbitrary as to amount to a confiscation of property, or a denial of the right to engage in a particular trade, occupation or profession, the Courts will interpose to protect the class of persons affected from its oppressive burden on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have 'the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property.'"

In dealing with particular taxes the Court of Appeals of Kentucky has frequently passed on the question whether they were so oppressive as to be unconstitutional.

In *City of Lexington* v. *McQuillan*, 9 Dana 513, the Court said:

> "The legislature in the plentitude of its taxing power cannot have constitutional authority to exact from one citizen, or even one country, the entire revenue for the whole Commonwealth."

In *Sperry* v. *Owensboro*, 151 Ky. 389, the Court struck down as unconstitutional, a city ordinance imposing a tax of $300.00 on a trading stamp company on the ground that

the tax was prohibitive. In the opinion, the Court said, at page 393:

> ". . . . courts will not sustain prohibitive regulations made under the guise of taxation. The plaintiff's business is not unlawful. It is a business which the state itself licenses. And while the city may also tax it, the tax must be imposed in good faith under the taxing power and not for the purpose of prohibiting the business. . . . . We think it evident, from the ordinance as a whole, that the tax of $300.00 on stamp companies was intended to be prohibitive and break up the business. Appellant's gross business per annum under the evidence, amounts to about $5,000.00, and its net profits amount to about $500.00 per annum. To tax such a business $300.00 per annum must have been intended to break it up."

Again at page 394:

> "It is true the business may increase and there may be more profit in it than is shown by the evidence; but the ordinance was evidently aimed at it as it is."

Applying the above language to the case at bar, it is evident that to tax Kroger $113,000.00 *when it only earned at the rate of eighty one* (.81) *hundredths of one* (1%) *per cent on its sales, or* $97,200.00 *on* $12,000,000.00 *of sales "must have been intended to break it up."*

Moore v. State Board of Charities and Corrections, 238 Ky. 243, 239 Ky. 729.

The attack on the Gross Sales Tax Law is based chiefly on the ground that it violates the constitution of the United States. In deciding these questions this Court is not bound by the result reached by the Court of Appeals of Kentucky in regard to the validity or invalidity of the Act insofar as the Federal Constitution is concerned.

Counsel for the appellees may call the Court's attention to the decision of the Court of Appeals of Kentucky in the case of *Moore* v. *State Board of Charities*, 239 Ky. 729, holding the challenged Act valid.

We believe a history of this case is important in determining whether the decision should have any bearing on the results reached by this Court.

In the first place the decision in the *Moore case* was handed down on June 19, 1931. This was six months after the order of submission to the United States District Court (Stewart, record 70). Furthermore, the action on which the decision is predicated was not filed until after the submission to the Federal Court. While the Federal Courts in construing a state statute are bound by the construction placed thereon by the highest Court of the State, we submit that they are not so bound when the case under consideration was presented to them before the action in the State Court commenced. Furthermore, they are not bound by any conclusions of the State Court when those conclusions are mere dicta.

The record in our case contains the testimony of Mr. Shirley Haas (Stewart, record 296). Mr. Haas is Secretary of the Kentucky Food Distributors Association which lobbied for the gross sales tax law. Mr. Haas was the gentleman who distributed the circular which contained the statement that the chains would be walloped by the sliding scale of taxation, that 92% of the independents would be completely exempt from taxation, while 8% would only have a small tax to pay. One of Mr. Haas' bulletins refers to a suit which was to be filed in the Franklin Circuit Court to contest the sales tax law. At page 300 of the Stewart record, Mr. Haas states that this reference was made in regard to a man who had been picked out to file the suit. He goes on to say that he was informed "through Leslie Morris, who represented the Penal Charities Board, that

they would pick out someone as plaintiff to bring the action to test the law."

Later Mr. Leslie Morris acted in conjunction with the Attorney General in defense of the suit which was filed by Forrest Moore.

The record in the *Moore case* discloses the fact that he had no tax to pay. In other words, he was one of the beneficiaries under the Act and was in no way discriminated against. The Court of Appeals held that inasmuch as the record showed he was not one of the class who would be compelled to pay any tax, he was not a proper person to bring the suit (238 Ky. 243). The Court also refers to the fact that Moore only introduced a short affidavit in support of his contentions.

The complainants in these cases and the taxpayers whom they represent, were not parties to the litigation in the State Court, their suits having been brought in the Federal Court.

With great reluctance, we feel constrained to point out to this Court the circumstances of the State Court litigation.

As indicated by the first opinion (238 Ky. 243), Forrest Moore brought suit in equity in the Franklin Circuit Court, as a general taxpayer, to enjoin the State Board of Charities and Corrections from making a contract with one J. M. Perkins for the purchase of a tract of land adjoining the State Reformatory at Frankfort, and *to enjoin the members of the State Tax Commission from proceeding with the enforcement or collection of the taxes imposed by the challenged Act.*

It appeared from such contract that the purchase price of the land contracted for was to be paid "*only* out of the Board's revenues arising from the collection of the gross sales tax," and that "in the event said law should be de-

clared unconstitutional, the contract provided that either party reserved the right to terminate it." (238 Ky. 244.)

Hence there was no real controversy between the plaintiff and the State Board of Charities and Corrections. It is impossible to escape the conclusion that the whole scheme of the Forrest Moore suit was to make a pretended attack upon the constitutionality of the Gross Sales Tax Law, with a view to losing the case.

This is demonstrated beyond a doubt by the testimony of Shirley E. Haas in the records before this Court (Stewart, 93-100; Kroger, 296-304).

Mr. Haas testified that he actively promoted the passage of the Gross Sales Tax Law through the Legislature, and that he actively participated in financing the expenses of the *Forrest Moore case,* and he filed with his deposition bulletins issued by him to various retail stores urging them to contribute to the expense of the defense of the suit which was ultimately brought in the name of Forrest Moore, *a plaintiff selected for that purpose* by counsel representing the *defense* in the case.

Notwithstanding the provisions of Section Ten of the challenged Act, positively interdicting a suit in equity as a remedy for testing the validity of the Gross Sales Tax Law, the Franklin Circuit Court took jurisdiction of Forrest Moore's suit, in the form in which he brought it, and rendered a judgment upholding the validity of the law.

Moore appealed to the Court of Appeals for the purpose of eliciting a decision by that Court on the constitutionality of the Act, and on March 27, 1931, that Court, in *Moore* v. *State Board of Charities and Corrections, et al.,* 238 Ky. 243, reversed the judgment of the Franklin Circuit Court solely on the ground that Forrest Moore, not being a taxpayer under the Act, could not question its validity. For that reason the Court of Appeals would not undertake to pass upon the validity of the Gross Sales Tax Law in the

Forrest Moore case until and unless some taxpayer under the law should be made a party to the litigation.

On the return of the *Forrest Moore case* to the Franklin Circuit Court, and while these cases were still under submission to the Court below, the D. T. Bohon Company, a taxpayer under the Act, was by amendment to Moore's petition made a defendant and called upon to assert its claims in that litigation.

Of course, the Bohon Company did not have to join in that litigation for the purpose of making an attack upon the validity of the challenged Act, and equally, of course, Forrest Moore could not have proceeded in that litigation without the Bohon Company.

The Court of Appeals having the matter presented to it for a second time held that the Gross Sales Tax Law of Kentucky was constitutional. (239 Ky. 729.)

We believe that the record in the *Bohon case* clearly indicates that the Bohon Company was no more representative of the class of taxpayers upon whom the burdens of the gross sales tax were intended to fall, than was Forrest Moore.

As a matter of fact it has since been shown by another Court of Appeals case that Bohon's interest was to sustain rather than defeat the law inasmuch as he had a contract to sell the State Board of Charities some land which could only be consummated if the gross sales tax law was upheld.

The State vigorously contends in this case that injunctive relief is not permissible in view of Section Ten of the Act. We believe that this argument is not applicable to the case in the Federal Courts, but if it is correct it would certainly have been conclusive in the *Bohon case*. Consequently the remainder of the Court's decision in that case is mere dicta and is not binding on this Court.

Furthermore, the record in the *Bohon case* showed that the D. T. Bohon Company at the most only had to pay

$253.52 under the law. Its sales were taxed in the lower brackets. The Court did not have before it therefore the issue of deprivation of equal protection of the law, inasmuch as the law discriminates against those in the higher brackets in favor of persons in the lower brackets. It is a well settled rule that courts determine the constitutionality of a statute on the basis of its effect on the party before it and not on the claim which that party sets up as to how the law would effect some other person who is not before the court.

What has been said in regard to equal protection is equally true in regard to the point of confiscation. A tax of $253.00 on the sales of a merchant for an entire year cannot be deemed confiscatory, but a tax of $113,000.00 is in an entirely different category. A decision that Bohon's $253.00 tax is not confiscatory should certainly have no effect on this Court on the question of whether the tax which the Kroger Company or the tax which the Stewart Company has to pay is confiscatory.

That the Court in the *Moore case* did not go into the issue of the confiscatory nature of the tax measure for the reason that the Bohon tax was low, is indicated by the fact that none of the decisions of the Kentucky Court of Appeals which we have heretofore referred to was mentioned in the Moore decision.

There was nothing in the record in the *Bohon case* which indicated whether that company operated a farm either in or out of Kentucky. We claim that the Kentucky Gross Sales tax law violates the interstate commerce provision of the Federal Constitution because it imposes a tax on merchants selling farm products raised outside of Kentucky and exempts merchants selling farm products raised in Kentucky. The only one who can raise this point is a merchant who has a farm outside of Kentucky and who brings the products of that farm into Kentucky for sale. The Kroger Company is such a merchant (Kroger record 126,

221-226). The opinion of the Court of Appeals in regard to this point therefore is also dicta and is not binding on this Court.

The same is true in regard to the statements of the Court of Appeals in regard to Interstate Commerce. This question did not arise insofar as D. T. Bohon Company or Forrest Moore were concerned. It does arise in the case of the Stewart Dry Goods Company.

In the original *Moore case* (238 Ky. 243) the Court declared:

> "It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard. *Indeed, it might be argued, with what soundness we expressly do not say, that they would not even be bound by the decision in this case because of the lack of representation.*"

The Court of Appeals of Kentucky has therefore recognized, that they were doubtful whether persons who had a just cause of complaint under the gross sales tax law would be bound by a decision when they were not represented in the case which led to the decision.

On this record we have shown the distinction between the four complainants in this case and Forrest Moore and D. T. Bohon Company. Forrest Moore had no tax to pay and the D. T. Bohon Company fell in the lower brackets, and there was no discrimination as to them.

Using the language of the Court of Appeals of Kentucky, we believe that the complainants in this case are not bound

by the decision in the Forrest Moore case because of lack of representation. Furthermore, we believe they are not bound by that decision because the issues involved in these cases were not before the Court of Appeals of Kentucky in the Forrest Moore case.

The Federal Courts are of equal dignity with the State Courts. The Constitution of the United States has granted to parties under certain circumstances a right to present their controversy for adjudication to a Federal Court rather than to appear before a State Court. We believe that a Federal Court, once a question is submitted to it, should have a right to determine the issues without any interference by the State Court. This is especially true when the case in the State Court is sponsored by the opposing parties for the purpose of securing a decision which will foreclose the rights of the litigants in the Federal Court. Such action taken in the State Court is in total disregard of the spirit of comity which should exist between those coordinate branches of the Government.

Of course the Court of Appeals of Kentucky decided the case which was presented to it. That was all it did. It did not and could not decide a case on issues presented as they have been in these cases now before this Court. We believe that if the appellants in this case would appear before the Court of Appeals of Kentucky that Court would grant them a full consideration based on the fact that their record presented issues not raised in the D. T. Bohon record. We believe that this Court should decide this case without any regard to the result reached in the Bohon suit.

The Forrest Moore case is distinguishable from the instant case inasmuch as we are here asking for an interlocutory injunction under the rule of *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

The rule governing this Court upon the pending applications for interlocutory injunctions is thus laid down in that case:

> "Where the questions presented by an application for an interlocutory injunction are grave, and an injury to the moving party will be certain and irreparable if the application be denied and a final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by bond, the injunction usually will be granted."

In passing upon the pending applications for interlocutory injunctions, this Court must give weight to the circumstance that the plaintiffs have had no opportunity whatever to controvert the *ex parte* affidavits filed by defendants.

Under the rule above quoted, this Court is *now* called on to decide only, if the plaintiffs, upon their proof, have made out a *prima facie* case showing certain and irreparable injury if the application be denied and if a final decree should be in their favor *after* they have had an opportunity to controvert the evidence contained in *ex parte* affidavits resisting the application.

On the other hand, the case before the Court of Appeals came up for final hearing. The plaintiff in that case conceded the correctness of the affidavits. Once an interlocutory injunction is granted in this case and the case is submitted on final hearing, we believe that we can successfully controvert the affidavits filed by the defendant. We believe that the complainants should not be foreclosed by a case where the plaintiff intentionally made no attempt to controvert the affidavits for the purpose of assisting the Attorney General in sustaining the taxing measure.

The Moore case was entirely ignored by the District Court. It should not be considered here because it arose and was decided upon issues and on a record obviously framed by both sides of the case for the purpose of sustaining the law, and actuated by a desire to forestall and influence these proceedings, previously filed, argued and submitted to the three judge Federal Court.

CONCLUSION.

For the reasons herein stated, we urge that the judgment of the lower Court dismissing the Bills of Complaint upon the ground that the claimants have an adequate remedy at law, be reversed, and that these cases should be remanded to the lower Court with instructions to grant the interlocutory injunctions prayed for by the appellants.

Respectfully submitted,

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APPENDIX A.

"AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand (Four hundred thousand Dollars) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand (Four hundred thousand dollars) Dollars and not exceeding Five hundred thousand (Five hundred thousand dollars) Dollars; five-twentieths of one per

cent on the excess of the gross sales over Five hundred thousand (Five hundred thousand dollars) Dollars, and not exceeding Six hundred thousand (Six hundred thousand dollars) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand (Six hundred thousand dollars) Dollars, and not exceeding Seven hundred thousand (Seven hundred thousand dollars) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand (Seven hundred thousand dollars) Dollars and not exceeding Eight hundred thousand (Eight hundred thousand dollars) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand (Eight hundred thousand dollars) Dollars and not exceeding Nine hundred thousand (Nine hundred thousand dollars) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand (Nine hundred thousand dollars) Dollars, and not exceeding One million (One million dollars) Dollars; one per cent on the excess of the gross sales over one million (One million dollars) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission, from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the

amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, one thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one, One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter he enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid

into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section Four thousand and two hundred and sixty-three-four of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications herein required to be made, shall be confidential, and any person divulging such information shall be guilty of misdemeanor and upon conviction, shall be fined not exceeding Five Hundred (Five hundred dollars) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prose-

cutions for any other infraction of the tax laws of this State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of misdemeanor, and upon conviction shall be fined not exceeding One thousand (One thousand dollars) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to t[illegible] penalty imposed in Section Five of this Act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the ag-

grieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor."

APPENDIX.

KENTUCKY LAWS CITED.

(CARROLL'S 1930 EDITION, KENTUCKY STATUTES.)

I.

GROSS RETAIL SALES TAX LAW.

Acts 1930, Ch. 149 (Baldwin's 1932 Supplement, Ky. Stat., §4202a-1-12):

"AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm

products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

§2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one percent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over

Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

§3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to

every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

§4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

§5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the

rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

§6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and

penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

§7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the

whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

§8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

§9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

§10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the

tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

§11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

§12. All laws and parts of laws in conflict

herewith are hereby repealed to the extent of such conflict.

§13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

Approved March 17, 1930."

II.

STATUTES AUTHORIZING REFUNDS OUT OF TREASURY.

Ky. Stat., §162:

"When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

Ky. Stat., §4224b-9:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed for any reason whatever, but

the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the auditor of public accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of its payment. If it is legally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the auditor of public accounts then in office to issue his warrant on the treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the treasurer shall pay the same out of the public road fund of the state. A separate suit need not be filed for each separate payment made by any taxpayer, and a recovery may be had in one suit for as many illegal payments as may have been made, and which are not barred by the limitation of two years herein imposed."

Gross Sales Tax Law, Section 10.
(Appendix, pp. 7-8.)

III.

LEGAL RESTRICTIONS UPON REFUNDS OUT OF STATE TREASURY.

Kentucky Constitution, §230:

"No money shall be drawn from the state treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually."

Ky. Stat., §143:

"A warrant of the auditor upon the treasury shall state upon its face the date, amount, and the name of the person to whom payable, and on what account, and out of what fund to be paid; and shall not be issued unless the money to pay the same has been appropriated by law; and he may require any claimant to state on the face of his claim the law under which it is payable."

Ky. Stat., §4688:

"No money shall be paid out of the treasury except upon the warrant of the auditor, drawn upon the treasurer as now or may hereafter be provided by law, and then only by the check of the treasurer upon a designated state depository; and no such check shall be given by the treasurer, even though the auditor issues a warrant therefor, unless the law under which the money may be claimed expressly directs and orders that it shall be paid out of the public treasury."

Ky. Stat., §4688a-2:

"Whenever any warrant hereafter issued by the auditor of public accounts shall be presented to the treasurer for redemption, and the funds appropriated for the purpose for which said warrant was issued are exhausted, the treasurer shall endorse thereon the date of its presentation with the words 'No funds with which to pay this warrant, and it bears five per cent (5%) interest from this date until called in,' with his official signature thereto, and such warrant shall thereafter bear interest at the rate of five per cent (5%) per annum, payable semi-annually."

Ky. Stat., §4688a-4:

"The treasurer may, whenever there are funds in his hands amounting to as much as fifty thousand dollars ($50,000.00), subject to the payment of outstanding warrants, call for such number of warrants by serial number, which, in the aggregate, do not exceed the amount of money on hand, for the purpose of redeeming them and which have no date of maturity fixed for their payment as provided in §4688a-2 of this act. The call of the treasurer shall be published by him for ten consecutive days in a daily newspaper published in this state, and no warrant so called in shall bear interest after the expiration of said ten days' publication. Nothing herein, however, shall prevent the payment by the treasurer of said warrants due according to the date of issue, if presented without awaiting such publication."

IV.

RIGHT TO SUE STATE OR AUDITOR OF PUBLIC ACCOUNTS AND VENUE OF ACTION.

Kentucky Constitution, §231:

"The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

Ky. Stat., §340a-1:

"That the order of any of the courts of this Commonwealth now authorized by law to approve and allow the fee-bills, settlements, credits, charges, and claims against the treasury of any

of the officers of the Commonwealth, or of other persons having claims against the treasury, shall only be regarded as *prima facie* evidence of the correctness and legality of such fee-bill, settlement, credit, charge, or claim; and such order shall in no case be treated as a judgment, or be made conclusive against the state; but the auditor, if he believe such fee-bill, settlement, credit, charge, or claim is fraudulent, erroneous, or illegal, may, with the advice of the attorney-general, refuse to pay, and may contest the same in the Franklin circuit court, *which said court shall have jurisdiction of all suits or proceedings against the auditor to compel the payment of claims against the treasury.*"

(Italicized portion construed in Greene v. Wolfe, 175 Ky. 58, to restrict jurisdiction to Franklin Circuit Court.)

Gross Sales Tax Law, Section 10—*Ante*, pp. 7-8.

(Venue of action prescribed by Section 340a-1, Kentucky Statutes.)

V.

CORPORATION LICENSE TAX.

Ky. Stat., §4189-2:

"Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears

to the aggregate amount of property owned and business transacted in and out of this state."

VI.

LEGISLATIVE ACTS DECLARING INSOLVENCY OF GENERAL FUND.

Acts of 1932, Ch. 20, pp. 119-123.
See brief, pages 18-20.
Acts of 1926, Ch. 13, pp. 85-89.
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Supreme Court of the United States

October Term, 1932

No. 27

THE STEWART DRY GOODS COMPANY, . . Appellant
Vs.
JOHN B. LEWIS, ET AL., ... Appellees

No. 28

FRED LEVY, ET AL., ... Appellants
Vs.
JOHN B. LEWIS, ET AL., ... Appellees

No. 29

J. C. PENNEY COMPANY, ... Appellant
Vs.
JOHN B. LEWIS, ET AL., ... Appellees

No. 30

KROGER GROCERY & BAKING COMPANY, . Appellant
Vs.
JOHN B. LEWIS, ET AL., ... Appellees

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Supreme Court of the United States

October Term, 1932

No. 27

THE STEWART DRY GOODS COMPANY, . . Appellant

Vs.

JOHN B. LEWIS, ET AL., ... Appellees

No. 28

FRED LEVY, ET AL., ... Appellants

Vs.

JOHN B. LEWIS, ET AL., ... Appellees

No. 29

J. C. PENNEY COMPANY, ... Appellant

Vs.

JOHN B. LEWIS, ET AL., ... Appellees

No. 30

KROGER GROCERY & BAKING COMPANY, . Appellant

Vs.

JOHN B. LEWIS, ET AL., ... Appellees

BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

INTRODUCTORY STATEMENT

The appellants here were complainants below. They filed four separate equity suits in the District Federal Court, challenging the validity of the Kentucky "Gross

Sales Tax Law" (Sessions Act 1930, Chapter 149). By the bills of complaint the appellants sought relief through applications for interlocutory and permanent injunctions against the enforcement of the challenged Act, upon the grounds that the enforcement of the Act was in violation of the equal protection and due process clauses of the Federal Constitution and imposed a direct burden upon inter-state commerce. The appellees filed motion to dismiss the bills of complaint, upon the ground that the appellants had a plain, adequate and complete remedy at law. They also filed answers to each of the bills, presenting an issue as to the validity of the challenged Act.

The court below held that the complainants had a plain, adequate and complete remedy at law under the provisions of Section 10 of the challenged Act and "declined to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law and solely for the reasons stated in its said opinion sustains the motion of defendants to dismiss the bill and denies to the plaintiffs a permanent injunction or any injunctive or other relief prayed for by it."

These appeals are before this Court to reverse the judgment of the lower court denying appellants' motions for interlocutory injunctions and dismissing appellants' bills of complaint.

We are materially handicapped in the preparation of our brief, for the reason we have not been furnished with copy of appellants' brief on this date, Oct. 14, 1932.

ARGUMENT

PART ONE

SECTION 10 OF THE CHALLENGED ACT CONSTITUTES A CONSENT ON THE PART OF THE STATE OF KENTUCKY TO BE SUED AT LAW IN STATE OR FEDERAL COURTS FOR A RECOVERY OF THE TAX IMPOSED AND PAID UNDER THE ACT AND PROVIDES THE APPELLANTS WITH A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW.

Appellants sought by injunctive relief to escape payment of the tax on the theory that the provisions of the challenged Act are in violation of the Constitution of the United States and the Constitution of Kentucky.

That the illegality of a state or municipal tax is not of itself a ground for equitable relief authorizing a Federal Court to grant an injunction against its collection is well settled by a long line of decisions of this Court. This was so held in the following cases:

Dows v. Chicago, 11 Wall 108;
Hennawinkle v. Georgetown, 15 Wall 547;
Milwaukee v. Koofner, 116 U. S. 219;
Shelton v. Platt, 139 U. S. 591;
Allen v. Pullman Palace Car Co., 139 U. S. 658;
Arkansas B. & L. Assn. v. Madden, 175 U. S. 269;
Cruikshank v. Bidwell, 176 U. S. 73;
Indiana Mfg. Co. v. Koehne, 188 U. S. 681;
Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 76;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.

Injunctive relief against the collection of an alleged illegal state or municipal tax was denied in each of these cases. The relief was denied because the sole basis presented for granting the injunction was the illegality of

the tax. Section 723 U. S. Revised Statutes, Section 384, Title 28 U. S. C. A. forbids suits in equity where a plain, adequate and complete remedy exists at law. There is a special reason why injunctive relief should not be granted against the collection of a state tax on the ground of its illegality. The reason is stated in *Dows* v. *Chicago*:

> "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

In the case of *Boise Artesian H. & C. Water Co.* v. *Boise City* it was said:

> "An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operation of the state government has caused it to refrain from so doing in all cases where the federal rights of the person could otherwise be preserved unimpaired."

So far as National taxes are concerned Sec. 3224 U. S. Rev. Stat., Section 126, Title 26, U. S. C. A. prohibits absolutely an injunction against their collection. Concerning this provision it was said in State Railroad Taxes, 92 U. S. 275,

> "And though this was intended to apply alone to taxes levied by the United States it shows the sense of Congress of the evils to be feared if courts of justice could in any case interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instru-

mentalities and other modes of procedure are necessary than those which belong to courts of justice."

Concerning the system prevailing in the National Government it was said:

> "There is no place in this system for an application to a court of justice until after the money is paid."

As to what must appear in order that it may be said that such remedy does not exist is thus set forth in *Dows* v. *Chicago*:

> "There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be had."

Again:

> "It must appear that the enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked. In the cases where equity has interfered in the absence of these circumstances, it will be found upon examination that the question of jurisdiction was not raised or has been waived."

And again:

> "Numerous cases are found in the reports where jurisdiction has been taken under similar circumstances and the collection of an illegal tax restrained but our attention has not been called to any well considered case where a court of equity has interfered by injunction after its jurisdiction was questioned except upon some one of the special circumstances mentioned."

In *Boise Artesian H. & C. Water Co.* v. *Boise City*, the matter was thus put:

> "In order to give equity jurisdiction there must be shown in addition to the illegality or unconstitutionality of the tax or imposition other circumstances bringing the case under some recognized head of equity jurisdiction before the remedy by injunction can be awarded."

In *Arkansas B. & L. Association* v. *Madden*, it was said:

> "The rule is that collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary processes of law and that there are special circumstances bringing the case within some recognized head of equity jurisdiction."

According to this, two things are essential: absence of such remedy and presence of such circumstances. In the case of *Cruikshank* v. *Bidwell*, 176 U. S. 73, the statement was:

> "It is well settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of law or that the case is under some recognized head of equity jurisdiction."

The court below held that the appellants had a plain, adequate and complete remedy at law in Section 10 of the Challenged Act. That Section follows, in part:

> "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and

when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts, then in office, to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the general fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

Appellants seek to escape the plain and specific language of this section by urging that it does not afford the taxpayer an adequate remedy at law. This contention is based upon the theory (A) the taxpayer who pays under protest is required by Section 10 to accept a state warrant on a bankrupt fund; (B) the State has not consented to being sued at law in a Federal Court.

A.

The Taxpayer Who Pays Under Protest Is Not Required by Section 10 to Accept A State Warrant on a Bankrupt Fund.

The fallacy of appellants' position is shown by the clear and unassailable opinion of the lower court, (*Kroger record*, pp. 75-82). This opinion is a complete answer to the argument of the appellants. The Act provides that "if it is finally determined that said tax or any part thereof was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of

the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, with interest thereon, and the Treasurer shall pay same out of the general fund of the State." By Section 9 of the Act it is provided that one-half of the taxes raised thereunder shall be "set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said Board." The other half is "to be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth."

The contention that the money paid by the taxpayer will be spent immediately is not sustained by the language used in Section 9. It is provided that the tax shall be "set aside" to the two funds mentioned in Section 9; there is no provision that it shall be spent immediately.

The argument that any warrant issued to the taxpayer will be subject to a large discount is not sustained by the record. In determining whether this position is sound it is to be taken into consideration that these warrants are negotiable, bear five per cent interest, payable semi-annually and are free from taxation and it appears from the record that they are readily marketable. It does not appear that any discount has to be made in order to dispose of them, though it is likely that a small discount has to be given. But though Section 10 provides no other method of satisfaction of judgment recovered by the taxpayer than the issuance of such a warrant, his right is not limited thereto. He is entitled to and the court may require the issuance of a warrant drawn against the specific funds created by Section 9 out of the taxes paid under the act. The moneys to the credit thereof do not belong to the state, but to the taxpayers who have created these funds. The state holds same in trust

for them and it would be a breach of trust for it to apply them to any other purpose. This position is sustained by the case of *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681. The court held that if the county paid the state's part of the taxes collected by it into the state treasury after the filing of a petition for a refund by the taxpayer of the tax paid by him it was the duty of the county to refund same as well as its portion of the tax and it could not escape liability therefor by thereafter paying same over to the treasurer. This was on the ground, as held by the Supreme Court of the State of Indiana, that upon the filing of the petition the county became "a trustee for the claimant." That such would be the relation of the state to these funds is to be gathered also from the opinion in the case of *Atchison T. & S. F. R. Co.* v. *O'Conner*, 223 U. S. 280. It is not to be taken that the state would breach this trust. On the other hand it is to be taken that it would hold the funds until it was finally determined as to whether the taxpayers were entitled thereto and if it was so determined that they belonged to the taxpayers would at once pay them over to them. This would reimburse the taxpayers to the extent only of the principal of the sums paid them. They would still have to look to the warrants on the General Fund for the interest thereon. Section 10 respects this right and provides that the taxpayer recover interest on the tax paid by him from the date of its payment.

It is seriously urged that the taxpayer cannot refuse to pay the tax and submit to the drastic civil and criminal penalties in the Act.

The taxpayer can be subjected to but two proceedings, a civil and a criminal proceeding. And he can be readily relieved of these by complying with the statute and bringing an action to recover the tax which he has paid. In the case of *Allen* v. *Pullman Palace Car Company*, 139 U. S. 658 the court said:

> "So far as appeared, complainant could avert all the consequences which it deprecated as likely to ensue if the state officials were not restrained, by complying with the terms of the statute and availing itself of the remedy thereby afforded."

In the case of *Arkansas B. & L. Ass'n* v. *Madden*, 175 U. S. 269 in giving the reasons why the injunctive relief should be denied the court said, among other things, that the "bill sets up no special circumstances justifying the exercise of equity jurisdiction other than consequences which complainant can easily avert."

It may be that it is more convenient to try the question as to the legality of this suit in equity than at law, but that is not sufficient to justify this court in granting the injunctive relief sought. In the case of *Arkansas B. & L. Association* v. *Madden*, supra, it is said:

> "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law, but considerations of that character while they may explain, do not justify resort to that mode of proceeding."

By letter of recent date we are informed that appellants would rely on Chapter 20 of the Acts of the 1932 General Assembly, and upon Chapter 13 of the Acts of the 1926 General Assembly, and upon Chapter 122 of the Acts of the 1924 General Assembly, and upon *State Budget Commission* v. *Lebus*, 244 Ky. 700; *Rhea* v. *Newman*, 153 Ky. 604; and *Bosworth, Treasurer*, v. *Shuck*, 118 Ky. 458.

Chapter 20 of the Acts of 1932 purports to be an Act authorizing the funding of certain indebtedness, so called, of the Commonwealth of Kentucky, which is evidenced by outstanding State warrants, by the issuing of funding bonds and acknowledging and confirming the

validity of such warrants and the indebtedness evidenced thereby, but this Act was held to be unconstitutional in *State Budget Commission* v. *Lebus*, supra, and the warrants held not to be an indebtedness.

Chapter 13 of the Acts of 1926 purported to be an Act to provide for execution and sale of $4,000,000.00 of bonds of the Commonwealth for the purpose of paying outstanding warrants of the Commonwealth and the interest accrued thereon, but the issue was defeated at the polls.

Chapter 122 of the Acts of 1924 purported to be an Act to provide for the execution and sale of $75,000,000.00 of bonds of the Commonwealth for building roads but when submitted to the people they voted against the issue.

The case of *Bosworth, Treasurer*, v. *Shuck*, 118 Ky. 458, holds that where a claim against the State is payable only out of a specific appropriation which has been exhausted, courts can not by mandate require the Auditor to issue a warrant for the claim on the Treasurer to pay it, but as pointed out in the opinion of the lower Court under the general law of Kentucky when there are no funds in the Treasury to pay the warrant drawn by the Auditor, the Treasurer shall stamp the warrant "interest bearing" and it bears 5% interest and is payable when the fund is sufficient to redeem it. *Rhea, Treasurer*, v. *Newman*, 153 Ky. 604, is relied on by appellants and it will be urged that these warrants are required to be paid in the order of their issue but an examination of the opinion will show, as pointed out by the Court below, that this requirement is only to insure fair treatment among the holders of outstanding warrants. Clearly, as held by the Court below, by virtue of Section 10 of the Act, and a fair and reasonable construction thereof, these warrants would take precedence over the other outstanding warrants, because it represents new moneys paid into the Treasury from taxpayers coming within the provis-

ions of the Act, where such taxpayers have been adjudged recovery thereof.

The case of *State Burget Commission* v. *Lebus*, supra, will doubtless be relied on because to uphold the validity of this funding measure it was urged by the Budget Commission that without the issuance and sale of bonds, as provided for by that Act, the outstanding Auditor's warrants will depreciate in value, the credit of the State will be unduly affected, and the expenses of the State Government can not be defrayed. Sufficient answer to this language relied upon by appellants to show the remedy afforded by Section 10 is not plain, adequate and complete would seem to be that the Court refused to adopt this theory and held the warrants not to be a debt against the State, and the funding act invalid.

The outstanding State warrants in this period of depression have not depreciated in value to any greater extent than bonds of the United States Government. The warrants of the State heretofore drawn on the general fund are selling on the market at ninety-three to ninety-five cents on the dollar.

We do not know what contention with reference to the present market value of Kentucky State warrants will be made by appellants, since we have not received copy of their brief. We are, therefore, not in a position to answer any argument which they may advance, except what we have just stated.

B.

The State by Section 10 of the Challenged Act Waived its Immunity and Consented to be Sued in Both State and Federal Courts.

Section 10 of the challenged Act authorizes the aggrieved taxpayer to prosecute an action either in the State or Federal Courts for a recovery of the tax paid

under protest. The action which it authorizes to be brought against the Auditor of Public Accounts is one against the State of Kentucky. This question is settled by the following cases:

North Carolina v. Temple, 134 U. S. 32;
N. Y. Guarantee Co. v. Steele, 134 U. S. 230;
Highway Commission v. Utah Co., 278 U. S. 194.

It is true that a state cannot be sued without its consent and, this being so, it can limit its consent to being sued in its own courts. If it so does it can not be sued in the Federal court. But here the consent was not so limited. There is no possible ground for claiming that it was. The provision is that the taxpayer "may sue the Auditor of Public Accounts in an action at law to recover the tax so paid." There is no limitation placed upon the general language. In the case of *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, the statute imposed the duty on the Board of County Commissioners to refund to the taxpayer an illegal tax which he had paid. This was the sole provision of the statute on the subject. It was held that this conferred on the taxpayer "a correlative right to enforce that duty by an action at law", and further, that:

> "This right was one which could be enforced by an action at law in the circuit court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present."

In each of the cases of *C. B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14-16, and of *Risty* v. *Chicago R. I. & P. Ry. Co.*, 270 U. S. 378-388, the decision in this case was cited in support of the position that if an action to recover a tax is allowed generally, i. e., without limitation, it may

"be brought in the courts of the United States under the usual conditions as well as in those of the State."

The remedy provided by the Tennessee statute involved in the cases of *Shelton* v. *Platt*, 139 U. S. 591, and *Allen* v. *Pullman Palace Car Co.*, 139 U. S. 658, was an action against the officer collecting the tax to recover it and the provision was that if the court determined that it was wrongfully collected then upon its certificate to that effect the Comptroller should issue his warrant for same on the Treasurer. It was held that because of this remedy the injunctive relief should be denied. This could only have been on the ground that such action could be brought in the Federal court or that it was immaterial whether it could or not if the Supreme Court had appellate jurisdiction of an action brought in the State court. The opening provision of Section 10, to-wit: "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground" makes certain that it was the intent of the Legislature to provide that the action which it authorized could be brought in the Federal courts of this State. There can be no question that the provision was directed to the bringing of such suit in Federal courts as well as the courts of the State. Its sweeping language requires this.

The other ground upon which appellants claim that the right of action conferred by the provision in question is confined to the State courts, to wit: that the relief which it authorizes is a writ of mandamus against the Auditor of Public Accounts and Federal courts have no jurisdiction of suits for mandamus is equally untenable. What it authorizes is the taxpayer may sue the Auditor of Public Accounts in an action at law to recover the tax which he has paid. This language means that he may sue such officer to recover a judgment against him for such tax so paid. It can mean nothing else. To the

same effect is the concluding sentence of the section which is in these words:

> "A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made and which are not barred by the limitation of two years herein imposed."

One can not be said to recover in a suit for a writ of mandamus. Nor can a recovery be said to be had in a suit of such a writ.

It is urged that this strained construction of Section 10 is required by Section 162 of the Kentucky Statutes in the light of which it should be construed. That section is in these words:

> "When it shall appear to the Auditor that money has been paid into the treasury for taxes where no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment and ought to be reimbused."

It is true that Section 10 should be construed in the light of Section 162. But the latter provision makes against and not in favor of such construction of Section 10. If the two are the same why the necessity of Section 10? But clearly on their face they are not the same. Section 162 makes no reference whatever to the bringing of any suit. All it calls for is an issuance by the Auditor of his warrant on the fact being made to appear that money has been paid into the treasury for taxes that

were not due. The right to sue for a mandamus to compel him to issue it if he refuses is not by virtue of any provision in the statute. It is because of a principle of the common law. Chapter 12 of Kentucky Civil Code of Practice regulates the procedure in such a case. Section 10 makes express provision for the bringing of an action. Section 162 provides a single step, to wit, the issuance of the warrant on the demand of the taxpayer. Section 10 provides for two steps, first an action at law to recover the tax and a recovery thereof in such action and then if the court determines that the tax has been wrongfully collected, i. e., adjudge a recovery thereof, the issuance of a warrant in satisfaction of such determination and judgment. Clearly the first step is not the same as the second. It is something different. It has no relation to a writ of mandamus. It is the second step which has such relation. The first step is and can be nothing else than a judgment for the recovery of the tax. The mandamus which is authorized is ancillary to jurisdiction already acquired by the action at law to recover the tax and the judgment thereon. It is in the nature of an execution to carry the judgment into effect. It is well settled that a Federal court has jurisdiction of such a mandamus.

Greene County v. Daniel, 102 U. S. 187;
Davenport v. Dodge County, 105 U. S. 237.

Referring again to the case of *Singer Sewing Machine Company* v. *Benedict* all that the statute provided was to impose on the board of county commissioners the duty of refunding to the taxpayer the illegal tax which he had paid and from the imposition of that duty the court implied that the statute conferred on the taxpayer a correlative right to sue not for a writ of mandamus, but to enforce that duty by an "action at law" which might be brought in the Federal court as well as the State

court. In the case of *Southern Ry. Co.* v. *Query*, 21 Fed. (2) 333, the South Carolina statute involved was, except in one particular, substantially the same as Section 10. That particular is that the right of action to recover the tax which it conferred was limited expressly to the "court of common pleas for any court having jurisdiction," whereas here there is no such limitation. This contrast between the two statutes evidences that the Legislature of Kentucky did not intend to limit the right of action which it conferred to the State courts. It was held that the right of action which in the State court it conferred was "to recover by an ordinary action at law." It never occurred to the court that the right of action which it so conferred was for a writ of mandamus.

In 25 C. J., p. 742, it is said:

> "The state having once consented to be sued, ancillary proceedings are within the Federal jurisdiction without further consent, unrestrained by the limitations of the Eleventh Amendment."

A similar rule was laid down by this Court in the case of *Gunter* v. *Atlantic Coast Line Railroad*, 200 U. S. 273.

By Section 10 the Legislature did something more than authorize the aggrieved taxpayer who has paid the tax under protest to file a suit in either the State or Federal court for the recovery of the tax so paid. The Legislature provided the aggrieved taxpayer, if successful in recovering a judgment for the tax, a specific and definite method of enforcing the judgment.

PART TWO

We shall, in this part of the brief, attempt to deal with the merits of the law under attack. We shall discuss under appropriate headings the questions which we deem important to a consideration of this phase of the case.

PASSAGE OF THE ACT

Every legislative act of any consequence must have its "ballyhoo" in order that a general interest may be aroused in its passage. An appeal was made to the small retailers of this State by certain individuals *wholly disassociated from the State Tax Commission, which sponsored the bill*, it being represented to them that this measure would impose no particular hardship upon them, and in a measure would serve to equalize the one-sided battle which they had been waging against their large chain store competitors, who by the legitimate practice of volume-buying, national advertising, and certain other features, later to be discussed, and the illegitimate practice of price-cutting for the purpose of throttling competition have threatened the very existence of small independent store ownership.

It is not, and can not be denied, that this legislative act had its inception in, was drawn by, and its passage was brought about by the State Tax Commission, unassisted and without the instigation of any individual or group. At the time of the passage of the act, certain small retail merchants undoubtedly favored its enactment, just as many of the large retailers and chain store owners opposed its passage by a powerful lobby. Such is true of every revenue act introduced, and this is necessarily so far the reason that when any tax measure is properly conceived, it must exact the greatest amount of tax from those most able to bear it and most able to wage

a vigorous fight against its passage. If it were not for the fact that this measure imposes no particular burden upon those whose earnings do not justify it, but rather upon those who are able to pay, and should pay, and are required to pay, the appellants would have very little to talk about. They, therefore, use this fact as a basis for charging class legislation, discrimination, oppression, confiscation, and have sought to paint a picture of impending communism.

Before undertaking a discussion of the evidence which has been introduced, we would call the attention of the Court to this fact. The test of whether this tax, or any tax, is confiscatory depends upon how it affects the group upon which it is imposed as a whole, rather than whether or not it happens to work a hardship upon a few isolated individuals, firms, or corporations, whose gross sales bear no proper relation to their net profits by reason of internal dissension, inefficient management, and attempts to throttle competition by price-cutting, or any similar system or practice.

It is significant that when a motion was made in the United States District Court in Louisville on the 28th day of March, 1931, that J. C. Penney Company, Stewart Dry Goods Company, Levy Brothers, and Kroger Grocery & Baking Company filed a verified list of those for whose benefit this action was brought, and who were silent partners to this litigation, a list of forty-seven of the largest business enterprises in the Commonwealth of Kentucky was produced and filed of record in this proceeding. It is reasonable, therefore, to suppose that of this large number, the four named appellants were chosen because of the fact that their net profits were far below what they should have been in proportion to their gross sales. This conclusion is arrived at when we take into consideration the situation of the Kroger Grocery &

Baking Company in particular, whose cries that the tax imposed upon it is confiscatory have rung the loudest. That company is not the largest retail grocery chain store company doing business in the State of Kentucky, but occupies second position to the Great Atlantic & Pacific Tea Company. From the fact that the Great Atlantic & Pacific Tea Company will be called upon to pay $15,000 to $20,000 more tax annually under this Act, we begin to wonder why, as the Company most affected, it has not actively participated in this litigation, but has left the burden of "carrying the ball" for the large chain store group to the Kroger Company. The answer is this: Lybrand, Ross Bros. & Montgomery, certified public accountants, are able to swear that they have completed and published their annual audit of the Kroger Company for the year 1930, which shows that the net earnings of that company were 81/100 cents on each dollar of gross sales for the year 1930, as against the average for the preceding six or seven years of considerably more than 2 cents and particularly for the year 1929, 2.07 cents.

The Great Atlantic & Pacific Tea Company, the "silent partner" in this litigation, closed its books for the year 1930 on February 28, 1931, reporting that it had 15,737 stores in operation, or a gain of 319 during the year. It likewise reported that for the year 1930, its stores turned in a volume of $1,065,806,000 gross sales, despite lower commodity prices. It likewise reported that *the increased volume of gross sales resulted in the margin of net profit being increased from 2-49/100 cents per dollar of sales in 1929 to 2-88/100 cents per dollar of gross sales in 1930.* The result was a net profit in 1930 of $30,000,000 as against $26,000,000 in 1929.

It may, therefore, safely be said that the position of the Kroger Company is hardly indicative of the general situation prevailing in the retail merchandising industry

as a whole, and this is made manifest by the charts which are filed by appellees as exhibits in these cases, and to which we shall specifically refer later on.

We call the Court's especial attention to what we have just said in order that this discussion may be approached with the full understanding, that the four merchandising enterprises which appear as appellants in this Court, and whose affidavits and exhibits appear in these cases, are hand picked out of a group of about fifty available, for the sole purpose of making the tax appear as rigorous as possible.

ANALYSIS OF APPELLEES' EVIDENCE

Whether or not this tax is violative of the Fourteenth Amendment of the Constitution of the United States and of Sections 171-181 of the Constitution of Kentucky is largely a matter of evidence, the rules of law enunciated in the decided cases being clearly defined and in the main possessed of little variation. It, therefore, seems well to enumerate and discuss in proper order the more important contentions which are advanced by the appellees in this proceeding, together with an analysis of the evidence introduced by way of substantiation.

I. THE RECENT SHIFT IN AMERICAN ECONOMIC LIFE AND CONSEQUENT INCREASED NEED FOR GOVERNMENT SERVICE

I. The general changes that have occurred in economic life in the course of the past several years, more particularly in the period since the World War, have been of such character as to necessitate increased activity on the part of the State. This has arisen in part because of changes in the organization of industry and trade, such as the shift toward corporation rather than partnership or individual business; partly from techni-

cal changes in production activities, such, for example as the development of the large use of highway transportation in business and industry; partly from the necessity of replacing services formerly provided by private initiation and now conducted by governmental authorities; and partly from other causes. These shifts to the modern way of carrying on social activities bring about the necessity of developing increased sources of state revenue, including especially heavier taxation of business enterprises. One large element in this change has been the shift in merchandising practice which has, in order to secure greater economic efficiency, resulted in requiring merchants of the new type to devote themselves more exclusively to business and hence has removed the possibility of their giving large effort to special activities on the one hand and on the other, has tended in the direction of increased non-resident ownership and management of retail stores with consequent instability of local managers' position, thus lessening the immediate interest of those in charge of *the store* in social activity. This has, of course, resulted in greater necessity of state activity to perform those duties formerly cared for by local initiative—individual or collective.

Analysis of the affidavits presented by appellants, if any evidence other than common observations were necessary, shows conclusively that large scale merchandising in Kentucky is carried on very largely by chain stores, department stores and departmentized stores of other classes. A study of the evidence presented by Professor Burr (Kroger record, p. 368) makes it clear that there is a distinct shift toward multiple-store merchandising (one form of large-scale merchandising), and he shows that this shift is taking place in such a way that more and more of the retailing in the United States is in the hands of multiple-unit stores. This is likewise emphasized in the affidavits of Robert W. Lyon and John B. Bonham,

presented by appellants (Kroger record, pp. 104-128), and also the evidence of Professor Nystrom (Kroger record, pp. 278-290). It may be set forth more explicitly perhaps by reference to the indexes prepared by the Federal Reserve Board and presented monthly in the *Federal Reserve Bulletin* (also quoted in Professor Paul H. Nystrom's *Chain Stores*, p. 31). This statement of the situation really takes only partial account of growth because it does not systematically include new chain organizations that are established from time to time but shows only the increase in volume of business conducted by those already in existence. It indicates that between 1919 and 1929 the chain grocery business increased more than 422 per cent. The 5 and 10 cent store business, the wearing apparel business, the drug store business, the shoe business, cigar business and the candy business, are shown to have increased greatly though in each instance somewhat less than the increase that occurred in the grocery business. In no case did the amount of chain store business actually carried on in these older merchandising plants fail to increase 200 or 300 per cent, except in the cigar and shoe business which had already grown to remarkable proportions, in the case of the relatively small number of merchants included, prior to 1919.

In the few instances in which data are available for earlier years (U. S. Department of Commerce, *Survey of Current Business*, August 1930, p. 119) the statistics indicate clearly that the growth has been exceedingly rapid since 1913.

As brought out in the testimony of Mr. Lyons and Mr. Bonham (Kroger record, pp. 104-128) it is entirely clear that this means a considerable shift in the method of carrying on the retail business of American communities. This is an obvious verification of the contention of appellees (*Kroger Answer, Kroger record* p. 63) that the chain-store method of doing business is in a consider-

able measure replacing older methods. This is likewise made obvious in the testimony of Dr. Walter Burr of the University of Missouri in his direct examination at pages 369 to 370 (*Kroger record*) of his deposition.

In view of the tendency—observed by all students of merchandising and of economic life in general—to replace the old style independent merchant with the large-scale department store or departmentized unit store or with the multiple-unit store (all of which classes often involve absentee ownership usually through the corporate form of organization thus separating the actual managers of the stores from an ultimate management), it is important to inquire how local social functions are to be carried on efficiently. In other words, making it essential that local employees give their time exclusively to the store and consequently impossible for them to perform community services formerly rendered by the old-style independent merchant raises the issue as to how society shall see that the functions are performed. Coupled with this development there has, of course, been a considerable saving of money, both to the consumer (at least directly) and more especially to the merchant (*Affidavit of James W. Martin, Kroger record*, pp. 329-333). Thus the large-scale retailer has much greater relative ability to support social activities than have the surviving independent, small-scale retailers.

This shift clearly must involve numerous incidental results as to the method by which community life is conducted in actual practice now that the element of voluntary service to the community rendered by local retailers—and, for that matter, by the local citizen—has considerably declined, though the need in this matter has remarkably increased. In actual fact, the state itself is undertaking much of the work. This appears to be almost inevitable, and it is perhaps most obvious in those lines of activity in which the immediate welfare of the

population is directly involved—that is, in those spheres where voluntary contributions of time and money bulked largest. For example, expenditures by cities in the United States for charities, hospitals, and corrections increased between 1919 and 1927 from $53,000,000 to $100,000,000 in round figures. Expenditures for recreation increased from $24,000,000 to $54,000,000 and expenditures for health and sanitation from $76,000,000 to $160,000,000. Various miscellaneous items increased from $34,000,000 to $78,000,000, (U. S. Department of Commerce, *Financial Statistics of Cities*, 1927, p. 49). Similar increases have been taking place in state expenditures as shown by the growth in payments for these same items by state governments in the same period from $134,000,000 to $193,000,000; from $1,000,000 to $4,000,000; from $14,000,000 to $28,000,000; and from $36,000,000 to $49,000,000 respectively (U. S. Department of Commerce, *Financial Statistics of States*, 1927, p. 26). Thus it may be seen that the movement is national in scope.

That it is equally clear-cut in Kentucky—though somewhat more concentrated—may be seen from the following tabular presentation of Kentucky data for the State and for cities as reported by the U. S. Department of Commerce.

GOVERNMENTAL COST-PAYMENTS BY KENTUCKY AND CITIES THEREIN FOR SPECIFIED OBJECTS IN 1927 AS COMPARED WITH 1919

(Round numbers)

Year	Charities, Hospitals and Corrections	Recreation, Etc.	Conservation of Health	Miscellaneous
State				
1919a	$2,100,000	$5,000	$85,000	$26,000
1927b	2,500,000	35,000	89,000	310,000
City-c				
1919d	459,000	136,000	156,000	2,000
1927e	848,000	188,000	525,000	259,000

a. *Financial Statistics of States*, 1919, Table 10.
b. *Financial Statistics of States*, 1927, Table 12.
c. Include Lexington and Louisville. No others are reported in detail for both years.
d. *Financial Statistics of Cities*, 1919, Table 11.
e. *Financial Statistics of Cities*, 1927, Table 12.

It appears, then, that the shift which has been taking place in the general economic organization of society, including especially retailing, has meant that society as such is called upon to shoulder numerous burdens hitherto carried on by voluntary activity—either cooperative or individual. No allegaiton is made as to whether that is desirable or undesirable. It is simply a fact that must be faced, and facing it means facing the necessity for providing state and local revenue to meet the exigencies of the situation.

Thus far the increased burden of resulting taxation has been borne in very large part—so far as retail merchandising is concerned—by the relatively smaller stores because the state has in the main employed the property tax as a means of raising the necessary revenues. This has of necessity resulted (*Affidavit of James W. Martin. Kroger record*, pp. 333-338) in throwing the burden on the small merchant rather than on the large one. This fact is made clear by exhibits submitted by the defense,

which show that to say there are simply two classes of retailers, large and small, is to misinterpret the exhibits which show unquestionably that there is a clear-cut tendency under the present tax system to impose a lower and lower rate on larger and larger merchants. In other words, the tendency extends from the very smallest scale of retailing to the billion-dollar-a-year retailer such as the Great Atlantic and Pacific Tea Company. There are, of course, slight variations, but there is not the least question but that the general tendency is apparent at all stages where there is a sufficient number of merchants to justify any statistical comparison. These facts necessitate, if the tax system is to result in fairness as between different taxpayers, that it shall be adjusted by arising a larger percentage of total revenue through the imposition of business taxes and through making those taxes definitely progressive; that is, making them levy a *higher rate* on the larger than on the smaller businesses. This is already done in a number of states, for example, Maine (*Affidavit of Henry F. Walradt*, pp. 305-311, *Kroger record*), Wisconsin (*ibid.* p. 6), West Virginia (*Gross Sales Tax Act*, 1925), and in Georgia (*Gross Sales Tax Act*, 1929).

The Gross Sales Tax Act in Kentucky provides a different scheme of graduation from that in these other states; but, if section 4 of the Kentucky Act be interpreted as a repeal of the numerous individual license taxes hitherto imposed except for the purpose of providing minimums, there is no instance at any point under the Kentucky Act of as steeply graduated rates as are to be found in the statutes of some of the other states. For example, under the 1881 Maine law (sustained and digested in *Maine* v. *Grand Trunk Railroad Company of Canada*, 142 U. S. 217), the tax on a railroad corporation having receipts per mile of $2,250.00 was 0.25 per cent of total receipts; whereas the railroad company which

had $2,250.01 a mile paid at the rate of 0.50 per cent on its gross receipts. Or, under the West Virginia gross sales tax act of 1925 there was provided a complete exemption of all receipts up to $10,000; thus the tax rate on the concern having gross receipts of $10,000.50 is *infinitely higher* than the rate on the business having gross receipts of $9,999.50.

The conclusion from this discussion, of course, is not that the several other states referred to have unreasonable graduation but that it is necessary for the legislature to exercise discretion in determining the rates and particularly in setting the bases and brackets for purposes of graduation.

The whole matter may be resolved into the simple statement that current tendencies in economic development—at least in retailing—make it necessary for the state to undertake functions which in a ruder civilization were performed by individuals—in concert or separately—on a voluntary basis and that the state must raise revenues to make possible the performance of these functions. Hitherto this increased tax levy has been imposed, so far as retailers are concerned, on relatively small-scale business because of the economic conditions prevailing—more especially because the small operator does not enjoy such rapid turnover and consequently is subjected to a heavier property tax, but particularly also because the large property is in general not assessed at as near 100 per cent of its market value as are the smaller-sized parcels of property. (The evidence on this point has been summarized in a recent study published by the Bureau of Business Research of the University of Iowa. *Assessment of Real Estate in Iowa and other Mid-western States*, and *Technical Bulletin* 172 published by the U. S. Department of Agriculture.) It is consequently necessary, in order to secure a semblance of equality, to offset the heavier effective rates of property taxes on

small merchants by a rate schedule of business taxes so drawn that the larger merchant will pay *higher rates* than the smaller merchant. Otherwise the total tax rate grossly discriminates in favor of the large-scale enterprise.

II. RATE STRUCTURE PROVIDED IN THE GROSS SALES TAX STATUTE

1. Precedents for the Kentucky Gross Sales Tax

Considerably over 2,000 years ago the Greeks used a gross sales tax providing rates of 1 per cent on sales of commodities. This applied both to imports into the city and to goods produced and sold in the city. At various times the rates varied, and sometimes there were different rates for different commodities. (Gilbert, *Greek Constitutional Antiquities*, p. 334 ff.)

At the present time Bolivia has a sales tax (*Sales Tax Act of January 23, 1918*) providing for rates of 0.5 per cent which exempts products taxed under other sales taxes provided in the law of Bolivia. It likewise exempts those having less than approximately $365 invested in business, thus introducing an element of graduation.

Even in the United States there are fairly numerous sales taxes, some of them general and some of them selective. Some apply to commodities of all or practically all classes (for example, the Pennsylvania Merchants' License, the Virginia Merchants' License Tax, the West Virginia, the Georgia, and the Mississippi Gross Sales Tax Acts); others apply only to commodities or services of specified classes. (For instance Ohio, Maine, and other public utilities taxes. See *Affidavit of Walradt, Kroger record*, pp. 305–307.)

The evidence which the appellees have submitted with respect to these several precedents has been attacked by appellants, but counsel have failed miserably in attempting to offset the effectiveness of the affidavit

of Dr. Walradt. For example, appellants remarks with respect to the French Sales Tax do not in the least invalidate the point that here is a great country imposing a tax of twice the highest possible rate under the Kentucky law without having confiscated or affected the business of French retailers. The innuendoes respecting Russia—and apparently designed to appeal to *presumed Anti-Soviet prejudice*—fall so flat as to merit no comment. According to Dr. Shoup of Columbia University, who is the leading American authority on the subject, there is no indication that France will soon abandon the 2 per cent sales tax now levied (Shoup, *The Sales Tax in France*, p. 353). Appellees have also shown (*Affidavit of Walradt, Kroger record*, pp. 307–308) that for fifty years the State of Maine has levied a *graduated* gross sales tax on specified classes of public utilities. That, contrary to appellees contention, the Maine statute provides a graduated rather than a proportional rate is conclusively shown by the following quotation from the act itself.

> "The amount of the gross transportation receipts as returned to the Public Utilities Commission for the year ended on the thirty-first day of December preceding the levying of such tax shall be compared with the net railway operating income for that year as returned to the Public Utilities Commission; when the net railway operating income does not exceed ten per cent of the gross transportation receipts the tax shall be an amount equal to three and one-half per cent of such gross transportation receipts; when the net railway operating income exceeds ten per cent of the gross transportation receipts, but does not exceed fifteen per cent, the tax shall be an amount equal to four per cent of the gross transportation receipts; when the net railway operating income exceeds fifteen per cent of the gross transportation receipts, but does not exceed twenty per cent, the tax shall be an amount equal

to four and one-half per cent of such gross transportation receipts; when the net railway operating income exceeds twenty per cent of the gross transportation receipts but does not exceed twenty-five per cent, the tax shall be an amount equal to five per cent of such gross transportation receipts; when the net railway operating income exceeds twenty-five per cent of the gross transportation receipts, the tax shall be an amount equal to five and one-half per cent of such gross transportation receipts; provided, however, that in the case of railroads operating not over fifty miles of road, the tax shall not exceed two per cent of the gross transportation receipts; and provided further that when the net railway operating income of any narrow gauge railway located wholly in this state exceeds five per cent but does not exceed ten per cent of its gross transportation receipts, the tax on such railroad shall be one-half of one per cent of its gross transportation receipts; and when the net railway operating income of such railroads exceeds ten per cent of its gross transportation receipts, the tax shall be one per cent of its gross transportation receipts; and when the net railway operating income of such a railroad does not not exceed five per cent of its gross transportation receipts, no excise tax shall be assessed upon it." (*Revised Statutes of Maine, 1930*, p. 238.)

Moreover, the Maine laws of 1881 and 1907, imposing progressive gross receipts taxes graduated without any reference *to net income or net earnings*, are completely ignored in appellants' discussion although upheld by the Supreme Court of the United States. The point is entirely clear that for thirty or forty years the State of Maine has imposed a graduated gross receipts (or gross sales) tax with maximum rates of thirteen times the lowest rate and that this statute was sustained by the Supreme Court of the United States (*Maine v. the Grand Trunk Railway, supra*).

The quibbling of appellants over Dr. Walradt's use

of the terms gross earnings, gross receipts, and gross income as synonymous with gross sales will, of course, have no tendency to confuse the court. As a matter of fact, the business of the Kroger Company is such that gross sales and gross receipts are practically identical. By a simple change in accounting practice—sometimes without any change—the retailer can, and doubtless will, show gross sales as the same as net sales. Under the law of Ohio also it is obvious that gross receipts, gross earnings, and gross sales mean the same thing, for the law provides that "such statements which also contain the entire gross earnings *including all sums earned or charged, whether received or not.*" (Sec. 5472–5474.) In general, therefore, it may be said that gross earnings, gross sales, gross receipts and net sales are for all practical purposes synonymous as implied in Dr. Walradt's discussion of the subject. (*Kroger record*, p. 307.)

2. The Relation of the Gross Sales Tax Act to Other License Taxes

Section 4 of the Kentucky Gross Sales Tax Act provides that:

> "Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the law now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

It is apparent from this provision that the Legislature sought to replace the numerous State excises on different types of retail business and portions thereof by one systematic license or excise tax, namely the gross sales tax. Consequently the statute by this credit pro-

vision simply retains the older licenses as minimum taxes on retail businesses and superimposes the gross sales tax in such a manner as to provide a systematic, graduated tax scheme for retailers. This is essentially what is done by the Virginia Merchants' License (*Tax Code of Virginia*, 1928, sec. 188), except that the Virginia Act provides a minimum and graduates the rate on larger enterprises, whereas the Kentucky statutes provides—by section 4, credits—i. e.—minimum rates for merchants and—by the scale of rates in section 2—specifies a scheme of graduation such that larger merchants pay a higher rate than smaller ones. In other words, the only element of the pre-existing license taxes retained by the 1930 statute is a series of minimums for different classes of retail merchants.

Appellants appear to be unable to distinguish between "credits" and "exemptions."

Section 4 does not provide for exemptions. *Retail merchants having the same volume of gross sales are subject to the same tax. The tax applies to all.* Section 4, however, provides that credit against this tax will be allowed to all merchants who have paid certain specified taxes for the amount of such taxes. This credit is open *to all* who have made such payments. If any merchant fails to receive any credit it is because he has not made any such payment. He does not have any higher gross sales tax imposed upon him than another merchant making the same amount of sales, but who has paid one or more of the specified taxes for which credit is allowed. He pays only the one tax—merchants receiving credit against their sales tax pay other taxes as well as the sales tax. In order not to have the total tax burden mount too heavily the law provides for the offset of these taxes against the sales tax. This works no hardship on the merchant who receives no credit since he has not paid the other taxes.

It should be noted that the credit is taken against the gross sales tax as computed and not against the gross sales before the tax is computed. The latter method would result in actually causing merchants having the same sales volume to be subject to different rates of the sales tax. The method provided by the law, however, results in all merchants having the same gross sales being subjected to the same rate of gross sales tax. Then in the case of mechants who have already paid certain taxes relief from the double burden is provided by means of the credit. Size has nothing to do with this credit. All merchants, large or small, who pay such taxes are allowed the credit.

The confusion of appellants respecting Section 4 seems to arise from lack of familiarity with tax terminology. They fail to differentiate between providing that one tax shall be in lieu of or a substitute for another tax and providing that one tax may be credited against another. For example, suppose that a given concern pays during a year $1,000 for license and other taxes mentioned in this section and that its gross sales tax amounts to $1,500. If the license and other taxes were in lieu of the gross sales tax, this concern would pay only $1,000; but if these taxes are credited against the sales tax, the concern will pay $1,500 consisting of the $1,000, for the license and other taxes plus $500, the amount by which the gross sales tax exceeds the credit allowed for license and the other specified taxes which this concern pays.

There is nothing discriminatory in permitting these credits since all retail merchants, whether large or small, are granted the same privilege. The one case in which on first thought there might seem to be discrimination is the credit allowed for corporation license tax. The appellants emphasize this, contending that individual merchants and partnerships are discriminated against since they cannot take advantage of this credit. Upon

second thought however it is clear that the act merely removes a discrimination which the state had been previously making against the corporations in favor of individuals and partnerships. Merchants who incorporated were called upon to pay a corporation license tax which individuals and partnerships engaged in retail merchandising did not pay. The State is under no compulsion to levy a corporation license tax and is, of course, free to reduce such a tax or repeal it altogether if it so desires. The Legislature in passing the Gross Sales Tax Law which applies to all merchants regardless of the form of business organization, apparently believed that since the incorporated merchants were already paying a license tax it would be imposing too heavy a burden upon them if they were required to continue to pay the full amount of the corporate license tax plus the new license tax in the form of a tax on gross sales. In justice to the incorporated merchants, therefore, and not to discriminate against the partnerships and individual merchants, the Act provides that any corporation license tax paid by a retail merchant may be credited against the Gross Sales Tax. What then at first appears to be unjust discrimination against individuals and partnerships engaged in retail trade turns out to be a move to prevent an unfair burden being placed upon the incorporated merchant.

In the light of all these facts, it is easy to see why defendants' witnesses (*Affidavit of Walradt, Martin and Phelps,* Kroger record, pp. 309-312, 333-335 and 359-360. See also *Walradt,* Exhibits A, C-J, pp. 312a, 313-317, 324c, and Martin, Exhibits 12-16, pp. 346a-353, prepared by Drs. Martin and Phelps and made a part of their affidavits) dealt with gross taxes—that is with the scale of rates prescribed by the Gross Sales Tax Act, and really comparable for concerns of different size, except as specifically noted.

If the interpretation outlined be accepted (and the

section itself says it must be) it will be observed that, contrary to the contention of appellants that competitors of department and chain stores pay no tax, every retailer actually pays some tax as provided either in this statute directly or indirectly by reference in section 4. The actual effect of this Act is to substitute one tax for many, the pre-existing numerous licenses, by means of section 4, credits being retained as minimum payments. It will be seen too that *identical minimums* are allowed for all taxpayers, *large and small*, handling the same type of goods in the same circumstances, irrespective of the amount of sales. That the State of Kentucky may provide such minimum taxes there is no question whatever.

The effect of the allowed minimums provided by section 4 is well illustrated by the analysis presented by Mr. Martin and Mr. Brendel (*Kroger record*, pp. 100-102). This table is particularly interesting in that it shows that the credits allowed against the tax apply to concerns doing a large business as well as to those doing a small business. If the percentage of those filing reports in each of the classes listed in the table, which indicated no net tax, be computed, the result is as follows:

Showing retail sales less than $400,000	32.5%
Showing retail sales between $400,000 and $500,000	33.3%
Showing retail sales between 500,000 and 600,000	50.0%
Showing retail sales between 600,000 and 700,000	25.0%
Showing retail sales between 700,000 and 800,000	50.0%
Showing retail sales between 800,000 and 900,000	100.0%
Showing retail sales between 900,000 and 1,000,000	No report
Showing retail sales in excess of $1,000,000	100.0%

The table shows that nine out of the twenty-one concerns reporting sales of over $400,000, or 42.8 per cent of the number reporting, had credits enough to offset the tax. This is a larger proportion than the 32.5 per cent shown for those concerns whose gross sales are less than $400,000. Six out of the twelve concerns reporting sales of over $500,000, or 50 per cent of the number reporting, had credits enough to offset the tax. The only concern

reporting sales of over $1,000,000 and subject to the highest rates of the sales tax had sufficient credit to offset the tax.

The selection of *merchants* rather than stores for taxation under this act is vigorously attacked by appellants in that they alleged unfair discrimination because unit stores in competition with Kroger stores pay less tax than is charged against the Kroger store—assuming an allocation to individual stores of the total tax paid by the Kroger Company. The appellees contend that the statute properly provides that the unit of comparison is the *concern*—which may be operating one small store, one large store, a small number of small or large stores, or may be operating a large number of either small or large stores. When a store is only one of a number of stores operated by one concern, it ceases to be an independent unit and becomes a part of an operating whole. In attempting to establish an equitable tax system the aim should be to distribute the entire tax burden equitably between the various concerns.

The appellees have shown that as a rule the larger the amount of business which is carried on by a concern, the greater its ability to pay taxes. The only way to compare the amount of business done by different concerns is to take the aggregate of all of the business enjoyed by each concern regardless of whether it operates one department or many departments, one store or many stores. The operation of this principle is seen in the case of the Federal Income and the New York State Income Taxes and in most general business taxes. An individual merchant may own several stores or be operating several departments in one store. He does not compute the taxable income for each store or department and pay an income on each of those amounts. On the contrary he must compute the total taxable income received from all the stores or departments which he owns and the tax

will be placed upon the aggregate. It is upon this principle that the Kentucky Sales Tax is based, and appellants have in no way disproved the justice of this principle when they show that some Kroger units, assuming the tax to be split up among its various units on the basis of volume of business done, would pay a larger sales tax than another single independent store doing the same amount of business. In other words, as appellants agree, "The act itself makes no differentiation between individual merchants owning one store . . . and so called chain stores . . . " *There is no discrimination whatever against chain merchants.*

This insistance that the concerns, when subjected to a business tax, should be taxed as a whole rather than by a tax on its separate units is in accord with the general practice in other fields. If there is any occasion to enter the courts, either as plaintiff or defendant, it is the Kroger Company, and not one of its local stores which is the litigant. Central buying and management exists; and whenever profits are to be distributed, each separate unit does not send out dividends to its separate stockholders, but the Kroger Company distributes the dividends. Some individual units may have operated at a considerable loss and other may have been very profitable, but it is the aggregate of the gains and losses which determines whether or not dividends can continue to be paid. So it is the aggregate volume of business carried on by the Kroger Company in Kentucky which determines the amount of the tax due under the Kentucky Gross Sales Tax Law.

The assertion of appellants that "This is in addition to all other taxes paid by Kroger and Kroger taxes will be more than $500 per store," when taken in comparison with "together with all license fees and other taxes in addition thereto," seems to involve some confusion. In arriving at the figure $500 per store, it is evident from

the quotation that license fees have been added to the gross sales tax, and "all other taxes" would seem to include corporation tax and property tax as well. On the other hand, the statement is made by the appellants that "on a per-store basis this (that is $500) is 400 to 500 times the tax levied on competitors with the same volume of sales per store." In other words, this asserts that such competing stores pay only $1.00 to $1.25 in taxes. Obviously this *does not* include license or property taxes and apparently refers to gross sales tax only. Such a comparison is clearly ridiculous.

Moreover instead of adding the license fees and corporation tax to the gross sales tax in computing the total tax per store these payments should be substracted, as provided in section 4 of the Act. This, of course, is another error which would be misleading but for its transparency.

In the light of all this discussion, it is entirely clear that appellants are distinctly in error in saying "the record also shows that there are only a handful of retail merchants in the whole state of Kentucky outside of Class I, and that by reason of the exemption practically everybody in Class I is . . . tax exempt." (Argument in court below.) (1) The table submitted by witness for appellants (*Affidavits of Martin and Brendel*, pp. 100–102) shows clearly that over two-thirds of those in Class I (that is, having sales of $400,000 or less) show net tax liability. This does not at all bear out the statement (even ignoring the fact that in essence the Section 4 offsets are simply minimum rates) that practically everyone in Class I is exempt. (2) These tables also show that the credits—not exemptions—allowed in Class I constitute less than 50 per cent of the gross tax—another evidence that by no means everyone in Class I is exempt. (3) Moreover, it appears from the table itself that those reporting sales of $400,000 and

over get at least as much advantage in the way of Section 4 credits as to those reporting less than $400,000. (4) It must be emphasized repeatedly that the Section 4 credits really do not mean tax exemption but merely provide minimum rates due under this act.

The appellants contend (argument in court below) that "section 4 affords a complete demonstration of legislative intent to discriminate in favor of the retail merchants having a small volume of sales and against retail merchants having a large volume of sales." "Its practical effect," they claim, "is a *complete exemption* of practically all the smaller merchants from the exactions imposed by this Act." (1) A study of this section fails to disclose any such legislative intent as portrayed by the appellants. The credit provided for by this section is open to any retail merchant, *whether his volume of sales is large or small,* who pays any special state license, excise, occupational, or corporation license tax. (2) The evidence presented by Martin and Brendel (*Kroger record,* pages 100 to 102) indicates clearly that the larger concerns benefit from the credit granted by section 4 fully as much as the smaller concerns. This evidence shows that *over two-thirds* of the merchants filing reports showing retail sales less than $400,000 pay a net tax under this gross sales tax law. It is difficult to see that its practical effect is a complete exemption of *practically all the smaller merchants* from the exactions imposed by this Act.

3. Character of Graduation Provided

The general scheme of graduation of rates provided in section 2 of the act under attack is distinctly usual in the construction of rates structure. It is a well accepted principle of taxation that those having more income are able to pay a higher rate of tax than those having less; hence graduation of rates. As shown particu-

larly in appellees' exhibits (*Walradt*, Exhibit C and D; *Kroger record*, pp. 313-318a) the tax rate provided in the Kentucky Act increases *very gradually* with sales volume until those having sales of several millions of dollars approach, but never reach, 1 per cent. For example, the gross rate at $12,000,000 is shown .94208 per cent, and no matter how much the sales increase the gross tax never reaches 1 per cent of sales. As shown above *gross tax* is more significant for analytical purposes than *net tax* because the Section 4 credits are to be regarded as minimum rates and not as a reduction of tax liability, as explicitly set out in the beginning of the section.

That the statute provides not eight arbitrary classes for tax purposes, erratically established, but specifies an infinitely large number of graduated rates is likewise clearly shown in Dr. Waldradt's analysis (*Waldradt*, Exhibit C, *Kroger record*, pp. 313-317). If increases in gross sales by $100,000 brackets be observed, the graduation rates is gently upward, the maximum jump taking place between $1,000,000 and $1,100,000 of gross sales and amounting to only .0632 per cent. Even this largest increase of all is really almost an infinitely small quantity. This is an entirely sufficient refutation of the argument of appellants that the Act prescribes eight arbitrarily selected classes for rate purposes. Appellants object that the rates are not proportional to gross sales, but they cite nothing in the Constitution of the United States or of Kentucky prohibiting a graduated gross sales tax. It is, of course, well established that the Legislature may adopt any reasonable rate structure in the absence of constitutional prohibition.

The element of arbitrariness repeatedly complained of in the construction of the schedule of rates is equally applicable to all graduated taxes. Why, for example, should the Federal sur-taxes begin to apply to income in excess of $10,000, so that less than 1,000,000 of the

45,000,000 income receivers in the United States pay taxes under the provision? Why should the exemption from the Kentucky inheritance tax for widows be $20,000 rather $10,000 or $30,000? All these amounts, as well as the brackets provided, are arbitrary in one sense—the same sense in which the graduation under the Sales Tax is arbitrary. *Cooley on Taxation*, 4th Ed., p. 716, gives a clear statement of the law on this point:

> "A classification having some reasonable basis is not invalid merely because it is not made with mathematical nicety, nor because in practice it results in some inequality."

The appellees have shown (*Waldradt*—Exhibit C-J; *Kroger record*, pp. 313-317 and 324c) that the progression of the effective rates of the tax is gradual and that the highest possible rate falls below 1 per cent of gross. Even a 1 per cent tax on the volume of business is low as compared with similar taxes imposed elsewhere, illustrations of which fact have been presented. The rates do not run as high as did the rates of the 1918 Federal Income Tax Law. All this evidence points to the fact that the lines or points upon which the Kentucky Legislature determined are *not* "very wide of any reasonable mark" and that therefore, "the decision of the legislature must be accepted" as Mr. Justice Holmes has said. (*Louisville Gas and Electric Company* v. *Coleman*, 277 U. S. 32.)

In discussing this alleged arbitrariness appellants have repeatedly erred with respect to rate comparisons. The J. C. Penney Company, Levy Brothers and the Stewart Dry Goods Company are not taxed at a minimum of twenty times as high as the rates levied upon their competitors with larger sales per store (*Kroger record*, p. 328). The net tax on these businesses is respectively .54 per cent, .43 per cent and .74 per cent or

the gross tax is approximately .63 per cent, .43 per cent and .78 per cent respectively. The minimum tax on competitors is at least .05 per cent; and, in most instances, the effective (license and gross sales tax) rate is really greater than this figure. It could in no case be less, as the license tax credits are not to be regarded as exemptions in any sense.

Appellants have attempted at several points to demonstrate that the rates increase rapidly by comparing the successive rates applicable to one bracket *only* with the rate of 1/20 of one per cent which applies to the first bracket. Such a comparison is misleading. The only way to see the correct picture of how rapidly the tax increases as gross sales increase is to compute the effective rate applicable to the entire gross sales which are being taxed. This is shown in Walradt—Exhibit C. (*Kroger record*, pp. 313-317). From this table it is very clear that the increase in the rate of the tax as gross sales increase is gradual, that it does not mount in geometrical proportion, and that the largest increase in the rate of the tax for one class over the preceding class is only .0632 per cent (*Kroger record*, pp. 309-310 and 328).

Appellants' discussion of the size of the steps in the graduation of the instant tax is interestingly vacuous in the light of the gross sales tax in West Virginia where the rate on natural gas is zero if the amount produced is worth $9,999 annually but becomes 1.85 per cent on amounts in excess of $10,000 (*West Virginia Gross Sales License Tax*, Act of July 1, 1925); or in the light of the Georgia Gross Receipts Tax Law (an act approved Aug. 29, 1929) where the rate on merchants jumps from zero to 0.3 per cent below and above $30,000 respectively.

It may be logically concluded, therefore, that the Gross Sales Tax Act conforms admirably to the specifications laid down by appellants when they alleged "that

the power of the State to classify for purposes of taxation is of wide range and flexibility, providing, however, that the classification must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (1) The classification is reasonable. As shown in Walradt—Exhibit C, (*Kroger record*, pp. 313-317) the increases in the effective rate from one $100,000 class to another are small, the largest being only .0632 per cent. (2) It rests upon the increase in the ability of concerns to pay higher rates as their business increases. This rule is generally sound, (*Kroger record*, pp. 306-307, 329-333, and 355-359), and the fact that illustrations in which large concerns have less taxpaying ability than small ones can occasionally be found, by no means nullifies the general rule. Thus the ground of this differentiation is fair and has a substantial relation to the object of legislation. (3) It treats all concerns similarly circumstanced alike in that all having the same gross sales and otherwise similarly situated, must pay the same tax.

4. Failure of Appellants' Subterfuges

One of the interesting subterfuges adopted by the appellants is that already referred to of confusing the issue by criticising the terminology of appellees, witnesses. This is more fully discussed in another section of this brief.

A second subterfuge, equally transparent, is illustrated from Mr. Bonham's testimony (*Kroger record*, p. 127).

> "It is *only because* we own a number of stores and the requirement that each store shall pay a tax return, based not on the sales of that store but on the sales of all other stores aggregate, that our tax

amount to $430 per store. In practical effect the law operates to prevent Kroger from operating a number of stores, *solely because of their number.*"

This is clearly an incorrect interpretation of the act. The tax is not imposed on the number of stores at all but on the volume of sales made by each concern. Kroger's tax would be just as heavy if it were conducted entirely under one roof and did the same volume of business. This tax progresses with the amount of business—not for the purpose of cutting down on the number of stores or departments operating but on the principle that the larger the volume of business done by a concern the greater its ability to pay taxes. This is true regardless of the reasons motivating a defense of, or opposition to, the Act when it was being considered by the Legislature.

The appellants have set up a number of other alleged instances of discrimination such as citing the case of Richman Brothers in competition with Levy Brothers where, as they allege, the discrimination arises "because they (Richman) have only one store in Kentucky;" whereas in actual fact the difference is due to the fact that Levy Brothers have large and Richman Brothers small sales in this Commonwealth. The same inaccuracy is found in the affidavit of Dann C. Byck (*Kroger record*, pp. 259-261) to the effect that differences in rate arise "merely because we operate a store selling a great many different items in a different city." Clearly this is not the real reason for the difference in reductions. If the total sales of Byck Brothers were either all in Louisville or all in Lexington the tax would be the same. It is not the fact that they are selling merchandise in two different cities or stores but that the total sales of the concern amount to what they do that determine the tax.

In general it appears that confusion of appellants' counsel is typified by the statement in the court below

that "the verified (!) reply denies that the tax in question levies a graduated tax upon the sale of goods at retail in the State of Kentucky;" while definitely asserting the proposition denied in the following words 'the rate of tax fixed by the Act is not proportional, but . . . *progressively* increases with *increased gross sales* in the following manner:" (stating the rates).

The summit of ridiculous presumption and naivete is attained in appellants' argument that increasing the volume of sales results from the altruistic wish to benefiting consumers. Do appellants really believe that retail merchants in general increase the volume of their sales and content themselves with a small margin of profit or even sell at a loss *in order to pass on to the buying public the benefits* of their efficient conduct of their business? Whom do you think is so witless as to believe this? *The reason and the only reason for retail merchants striving to increase the volume of their sales is to increase their net income. If their net income increases, their ability to pay taxes increases progressively, and it is this fact that the Gross Sales Tax recognizes in Sections 1 and 2, which provide progressive rates as the total gross sales of a concern increase.* Thus the implication of the appellants that these two sections were intended to unfairly discriminate against retail merchants having a large volume of business does not hold.

As a matter of fact, the tax herein imposed is not *proportional* but *graduated;* and its graduations are much less steep than those appearing in the Federal Income Tax of 1918 or in other gross sales tax acts effective in the United States at numerous points in their rate structure, as will be shown hereinafter.

III. ANALYSIS OF THE RELATION OF OPERATING STATISTICS TO NET INCOME, SHOWING THAT THE LARGER THE GROSS SALES THE GREATER THE NET INCOME

1. Economics of Large-Scale Retailing

Appellees have pleaded (*J. C. Penney Company Answer, Penney record*, p. 74) that large-scale retail business enterprises enjoy an increased earning power as compared with small-scale businesses by virtue of several well-recognized economic laws, among which are the following:

(1) "It is a well-established and well-recognized law of merchandising economics that the greater the volume of sales the greater the buying power." That this is the case is clearly set forth in affidavits of Morton and Phelps (*Kroger record*, pp. 329-333, 355-359), and in exhibits, Martin—1-5 inclusive (*Kroger record*, pp. 339-340). The common sense of the situation is entirely clear, likewise, since the fact that discounts are offered for large purchases is commonplace in the merchandising field. The fact is also developed, particularly in the testimony of Dr. Phelps beginning on page 355 that, regardless of the effectiveness of cooperation, economies achieved in this respect are not equal to those attained by centralized management, which is found only in large-scale retail enterprises such as appellants in these cases.

Note especially that the advantage of *buying in quantity* is urged by Mr. Lyons, witness for the appellants (*Kroger record*, p. 107) and hence it may be pointed out that, in effect, appellants recognize this contention though they likewise urge that these economies do not arise from the fact that sales are made through multiple outlets. Rather they arise from the large volume of business done. Incidentally, it may be worth while to indicate again that appellees agree cordially with the appellants that this tax is not an imposition on

chain stores as such; the implication in this section of the appellants' brief to the contrary notwithstanding.

(2) The principle is well established that "the ratio of turnover or volume of trade to capital invested increases progressively as volume increases." (*Kroger Answer.*) Appellees have persented substantial statistical evidence concerning this general view, the most impressive, perhaps, being that offered in Martin—Exhibits 6 and 7. (*Kroger record,* pp. 341-342). A study of these tables indicates that, taking all classes of retail businesses together and considering all data reported by the United States Census Bureau in the census of 1930 up to and including January 27, the average rate of inventory turnover gradually increases from around six times annually in one- and two-store enterprises to nine and one-half of ten times annually in large chain stores. It should be emphasized that, as repeatedly pointed out by appellants, chain stores constitute one of the two important classes of large-scale merchandising; and the data presented in Column 5, Table VI, confirms the general proposition. In a general way the showing for all stores in cities like those found in this Commonwealth tends to verify the data.

Turning to Martin—Exhibit 7 (*Kroger record,* p. 342) in which are presented data for grocery and variety stores, it is seen that, in the grocery trade, single-store independents are reported by the United States Census Bureau, Department of Commerce, to have an average turnover of less than 15 annually; whereas sectional and national chains have an average turnover of 19.42 per annum. The showing among variety and general stores is even more clear-cut in this particular than that for grocery stores. The table indicates an average turnover of 4.46 per cent for local variety and general stores and 7.14 per cent for large chains. Again column 5 confirms the general proposition suggested above that these data

are presented in such a way to show significant differences between large-scale and small-scale enterprises. Note that the statistics of cities shown at the bottom of the table verify this with added emphasis.

It may be concluded, therefore, contrary to the contention of appellants, that, according to official United States Department of Commerce findings, there is no question but that turnover increases progressively with volume of business done. There is no doubt but that occasional instances may be cited of small independent merchants who achieve a higher rate of turnover than the average chain, but this has no bearing on the general proposition submitted, since obviously—if Census Bureau facts mean anything—it is an exception to the well established rule. Moreover in the court below appellees' contention is clearly admitted in the following language: "Public patronage has given Kroger a *larger volume of sales and thus enables* Kroger to dispose of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume."

(3) Generally speaking, it is a fact that the amount of income increases with increases in sales volume as Mr. Bonham (*Kroger record,* p. 123) and appellees (Martin—Exhibits 1-5 inclusive (*Kroger record,* pp. 339-340) disclosed, even though Vice-President Bonham goes on, toward the bottom of the same page, to contradict himself in the following language: "My experience is that earnings or net profits do not increase because of an increase in sales volume."

Were the showing of Mr. Bonham that larger gross sales result in a larger *amount* of net profits over that for sales of less volume, this would be adequate to establish the general proposition which defendants have stated and which is generally accepted by tax experts as true (*Affidavit of Walradt, Kroger record,* p. 311). However, it is not necessary to stop here, since data presented

by appellees show beyond question that, large merchants (and that includes all classes which, according to appellants, are subject to the higher rates of taxes under the Kentucky Statute) enjoy a *rate* of net gain in relation both to sales and net worth which increases progressively with increase in the size of the business enterprise. This proposition is re-emphasized in Martin—Exhibit 12 (*Kroger record*, p. 346A), especially in the summary at the end of the second page.

There is no contention on the part of the appellees that the increase in rate of earnings is *precisely the same* as the scheme of graduation provided in the Gross Sales Tax Act. As is shown above, it is not necessary that this be the case. That there is a relationship, however, is demonstrated clearly in these exhibits and in the *Affidavit of Martin* beginning on page 329 of Kroger record.

2. Increase in Net Income with Increase in Sales

The general proposition which the appellees seek to support in connection with the data submitted in Section III of Mr. Martin's evidence (*Kroger record*, p. 329) is that the classification in the Act on the basis of volume of sales is such that rates are properly made progressive, because ability to pay taxes increases progressively with increased volume. This is the fundamental argument. It is supported by the proposition that increased gross sales are typically accompanied not only by larger return on invested capital but even by higher *rate* of return; that increased sales are generally accompanied by more favorable buying opportunities (as shown above); and, as shown below, that the larger the business the lower the rate of tax required to be paid under the hitherto existing tax system. In support of these arguments (which are not concerned with arguments as to *stores* in the case of chain enterprises—because the tax act is not concerned with efficiency comparisons between individual

stores in the case of chain enterprises but with comparisons between the enterprises themselves), appellees submit that the data presented in Martin's evidence beginning at page 329 prove the case adequately. It is further bolstered by Dr. Phelps' testimony, page 355 et seq., in which he shows that, generally speaking, efficiency increases more than in proportion to increased size of the retail enterprise. In this connection, perhaps it should be suggested that the court can not possibly be misled by the reference to an *assumed* ratio of net gains to sales since the witness *assumed nothing* in connection with these exhibits but *presented directly* the results of careful investigation into the actual operating statistics of the merchandising enterprises concerned.

3. Relation of Rate Structure Provided in the Gross Sales Tax Statute to Ability to Pay

As shown in the appellees' evidence (*Affidavits of Walradt and Martin, Kroger record*, pp. 306-307 and 356-357), it is unnecessary to "turn aside from the Act itself and the basis of classification therein prescribed and try to imagine some other grounds for upholding such a law." (*Brief for appellants in court below.*) It must be borne in mind that, as appellants have insisted, "the Act is purely a revenue statute." *Whenever in a purely revenue measure progressive rates are used, the justification for such progressive rates is that they are necessary in order that those taxed may be taxed according to their respective abilities to pay.* There is no other reason for graduation in such a measure, and it is unnecessary to state this in a law itself.

The following quotation from Dr. Walradt, who is an eminent authority in the tax field, is in point:

> "The use of progressive rates in connection with gross sales tax is reasonable since in general

> the larger the gross sales the greater will be the net income of the concern making the sales. Ability to pay is measured by the *absolute* amount of net income received. It matters not from what source the income is received or how large a return is received on capital invested . . . If it is true that, as the amount of gross sales increases, the *amount* of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable." (*Kroger record*, p. 308.)

As clearly indicated in the *primary facts*, submitted in Martin—Exhibits 1-5 inclusive, and 12 (*Kroger record*, pp. 339-340, 346A) retail gross sales in relation to net income generally satisfy Dr. Walradt's conditions. In other words, the classification does rest upon ability to pay and is definitely related to net earnings. It is certainly true that the statute under attack makes gross sales and not net income the actual measure of tax liability. In this connection it is important to make two observations: (1) Gross earnings and gross receipts—that is, gross sales—have long been used by the states and by other countries as a proper measure of ability to pay taxes on the part of businesses. These have been upheld by the courts. (2) As gross sales increase there is a general tendency for net income also to increase. That this is not a universal tendency, does not alter its acceptability as a measure of tax-paying ability.

Many prefer gross sales to net income because of greater ease of determination, greater certainty, and consequent reduced expenses of administration. The test as to whether gross earnings or net, or some other measure of tax liability shall be adopted is a function of the legislature. Appellants have *asserted* that there is no connection between the rate structure provided in the law and ability to pay, but they have not *demonstrated this* contention. On the contrary, as indicated above, it appears that the Act itself definitely implies, if it does

not state, that this is its objective. Moreover, as shown in Section IV of Dr. Martin's affidavit (*Kroger record*, p. 333), the *facts of retail merchandising* confirm the judgment of the Kentucky General Assembly.

In connection with the relation between the rate structure provided and tax-paying capacity on the part of the enterprises subject to the Act, it is important to keep in mind that tax statutes are never so drawn as to guarantee that private business enterprises will be profitable. Indeed they are rarely so drawn as to exempt those businesses which are unsuccessful from tax liability. (Compare, for example, the property tax or the corporation license tax of Kentucky.) That the Gross Sales Tax Law applies to and imposes a burden on Schulte United even though that concern incurred a deficit in 1929 and may have incurred a deficit in 1930 (Martin—Exhibit 13, *Kroger record*, pp. 347-348) is no reason whatever for declaring the statute invalid any more than is the application of the property tax to realty owned by this corporation a reason for the invalidity of the property tax.

As appellees' witnesses have shown (*Kroger record*, pp. 306-307, 329-333, and 355-359), it is true that the businesses enjoying a larger volume have not merely proportionately increased but progressively increased taxable capacity. This assertion is based on concrete factual evidence from experience of many sorts of business enterprises in the exhibits presented, especially Martin—Exhibits 1-5 and 12 (*Kroger record*, pp. 339-340 and 346A). Where this is not the case progressive taxation would generally be out of the question as a matter of justice, but these facts indicate very clearly that in general large-scale businesses *are more profitable* than those operated on a smaller scale. In this connection it may be important to call attention again to the error of appellants' counsel in confusing *credits* or *off-*

sets with *exemptions.* Section four of the Act under consideration *does not provide exemptions;* it does provide credits. Consequently, in constructing the Walradt—Exhibit C (*Kroger record,* pp. 313-317), the witness deals with the situation as prescribed in the statute, treating the section four credits as the law prescribes, and not as the first sentence of section four prohibits, by saying that this tax is not "in lieu of any special State license, excise, occupational or corporation tax." Perhaps it might be well to emphasize again also that the statement that Kroger will pay $113,000 tax; whereas 16,000 merchants pay only $62,000 tax, is inaccurate. The latter figure is the amount paid after allowable credits have been deducted; whereas the figure given for Kroger is the gross item. This is obviously a misleading comparison. Finally, as is clearly shown in Martin—Exhibit 12 (*Kroger reaord,* p.346A), in the summary at the end, that failure to provide for graduation would have the effect of discrimination against the small-scale merchant. It is likewise shown in Martin—Exhibits 1 and 2 (*Kroger record,* p. 339) that small retailers would be clearly subject to unfair discrimination in the absence of reasonably progressive graduation such as that provided in the Kentucky statute.

Again, it is important to emphasize that some such graduation as that provided in this act is necessary as a means of distributing the tax burden reasonably apportioned in relation to ability to pay and, as clearly set forth by appellees' witness, this is true regardless of the source of the income. In general, taxation is imposed upon those who can pay the bill, if it is imposed fairly—whether that ability to pay arises from greater efficiency, better luck, or otherwise. For example, the property tax is levied on those who have property; income taxes are imposed on those who have income (steeply graduated and with very generous initial exemptions in the case of

the Federal income tax so that the great majority of citizens pay nothing under this act); and this act of the 1930 Kentucky Legislature proposes to tax those who enjoy business—the more the business the higher the rate of tax. This method of dealing with the citizen involves no assumption that those subject to heavy taxes are culpable but simply that they have capacity to pay. "The measure is purely a revenue measure."

4. Precedents for Adjustment of Rate Structure to Merchandising Conditions

A study of the testimony of Doctor Walradt shows clearly that the attempt on the part of the Legislature of the Commonwealth of Kentucky to provide a rate structure in this statute corresponding to the merchandising conditions which defendants have shown to obtain is distinctly not without precedent in the tax history of the United States and of other countries. As Doctor Walradt has indicated, such adjustment has on various occasions been secured through the instrumentality of different structural arrangements. In the first place, as pointed out by appellees' witness and as is clearly evident from the statutes, the Federal government of the United States and states like Mississippi and Wisconsin have imposed graduated income taxes. The attempts here have been to secure higher rates of contribution from those who have larger incomes and to do this on precisely the same principle involved in the Kentucky statute. For this purpose it is obviously a matter of indifference whether the precedent be found in Federal or in State practice. As a matter of fact, it is found in both.

In the second place, this adjustment of tax rates in order to levy on those businesses which have greatest taxpaying ability at higher rates has been sometimes achieved by graduation of rates on volume of sales. Per-

haps the best illustrations are those cited by defendants' witness Walradt of the 1881 and 1907 Maine taxes on public utilities of specified classes. It is to be observed that appellants' counsel in the preparation of briefs have studiously avoided any reference to these adjudicated statutes, even though under the 1881 law railroads whose gross receipts (gross sales of transportation service) per mile did not exceed, on the average, $2,250, paid 0.25 per cent of receipts, while roads whose gross receipts averaged over $11,250 per mile were taxed at the rate of *3.25 per cent* of their receipts. Thus, although the gross receipts of the latter class were only about five times those of the former, the tax rate was thirteen times as heavy. This law remained in force until 1907 when changes were made in the rates but none in the principles on which the tax was based.

Comparisons of this Maine act with the Kentucky Gross Sales Tax statute, using Kroger gross sales of $12,000,000 and the gross sales of another enterprise of say $400,000, will reveal that in Kroger's case the effective rate is .94208 per cent of gross sales and in the other .05 per cent. In other words, the rate of tax imposed on Kroger, whose sales are thirty times those of the competitor concern, is less than nineteen times as heavy; whereas, under the Maine law, multiplication of gross sales, by five meant a multiplication of the tax rate by thirteen. Or, to put it another way, in the Maine law the increase in the tax rate was over 2.5 times the increase in gross receipts; whereas under the Kentucky Sales Tax law the increase in the tax rate is slightly over half the increase in the volume of sales.

It appears, therefore, that when—to use the language of appellant counsel, "the court . . . states the law in Kentucky" in the following language, it is, to all intents and purposes, specifically upholding the Kentucky Gross Sales Tax statute; "A license tax may be

graded according to the volume of business done." (*City of Newport* v. *Frankel*, 192 Ky. 408.) Beyond any question, as the preceding discussion has shown, the Kentucky statute does precisely this thing, that is, *graduates the rates in proportion to the volume of business done.*

In explanation, it may be stated that a tax levy is controlled by two factors in the statute imposing the tax. The first is the *base*, which, in the present instance, is the volume of sales. The second is the *rate*, which may be *flat*—as in the Ohio utilities sales tax—or *progressive*—as in the Maine tax of 1881 or the Kentucky Gross Sales Tax of 1930.

It may be concluded, therefore, that appellants' argument to the effect that license taxes may be graduated in proportion to volume of business done without violating the "equal protection of the law's amendment to the Constitution, provided . . . the challenged Act aims at proportional equality of burden," is eminently sound and *settles the question* of *"equal protection of the law" involved here.* That the law aims at *proportional equality of burden* and thus secures equal protection is conclusive from cases cited. It has been shown here, in the light of precedent and in the light of merchandising conditions, that "proportional equality of burden" can be secured by no other method than by some such graduation of rates as provided by the Act now under attack. This conclusion is inevitable from a consideration of Martin—Exhibit 12 (*Kroger record*, p. 346A). (Compare summary-column 10 with summary-columns 11 and 12, and note the following from affidavit by appellees' witness).

> "The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column

ten shows what the average concern having extremely large sales, the average of those having moderately large sales, the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that, if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a decidedly lower rate on owned investment, and the smallest group, on the average, would find itself unable or almost unable to continue in business.

"Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises stil' earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent."

5. Relation of Rate Structure to Number of Taxpayers and Burden of Tax Imposed

It was asserted by appellants in the trial court that:

"An analysis of Professor Martin's testimony and his exhibits shows that his tables are not only unreliable, but that even if taken to be true, they do not, in any way, tend to substantiate the Answer of the Attorney General, that the ratio of net gain to net sales, or the ratio of net gain to net worth, or the ratio of ad valorem tax to sales or to capital invested, between the large merchant and the small one, is in any way comparable to the ascending scale of rates applied in the Sales Tax Act."

Let us look a little more closely at the analysis of operating results of retail merchants set forth in the

Martin affidavit. Incidentally it is interesting to inquire why appellants did not undertake to "analyze" the testimony in order to show its lack of reliability and equally intriguing that they should use so much space in briefing a case depending on wholly unreliable evidence (as they appear to allege).

A casual glance at Martin—Exhibit I (*Kroger record*, p. 339) shows that specialty stores from 1927 to 1928 which had sales of less than $1,000,000, say an average of $400,000, made a net gain of $9,800; whereas those who had sales of more than $1,000,000, say an average of $1,800,000, had a net gain of $67,000. The tax on the former would average $200; whereas, the tax on the latter would average $11,050. The tax for the merchant having sales of less than $1,000,000 would be $200 out of an income of $9,800 and that on the merchant with average sales of more than $1,000,000 would be $11,050 out of an income of $67,100. This means about 2 per cent of net income in the first case and 16 per cent in the second. Obviously this is not unduly steep graduation. Note that here, as in the cases discussed below, the rates are graduated progressively not flat (as appellants *assume* should be the case). As has been conclusively shown, this is essential if "proportional equality of burden" advocated by appellants is to be secured.

The same situation is shown, though even more clearly, in Martin—Exhibit II (*Kroger record*, p. 339). If one take the unweighted average (mean) rates for those brackets for the three years which are entirely in the less-than $400,000 area, it is found that the average net gain on sales of department stores is nearly 2.6 per cent. The average rate of net gains for the same period in the largest sized stores is just over 5.7 per cent. Assuming that the average of the former group of stores had sales of $200,000 and the average of the group of largest stores had sales of $15,000,000, it is clear from a

simple multiplication that the former had average net gain of $5,200 and the latter of $855,000. The tax on the former would be $100 and on the latter $143,050. Is it not obvious that a merchant earning $855,000 can pay a tax of $143,050 (somewhat over 16 per cent) as readily as another merchant with net gain of only $5,200 can pay $100 (about 2 per cent)? This involves comparison of the smallest-scale merchants with the largest, but comparison of the same type between any two brackets can easily be made. If such analysis be undertaken, it will be disclosed that there is in effect gentle graduation from the smaller department stores up to the larger ones.

Incidentally, it is interesting to inquire how statement of counsel for appellants that, "The evidence of the plaintiff . . . shows conclusively that the plaintiff has never made a greater ratio of net gain to net sales than two to two and one-half per cent," with the oath of Mr. John B. Bonham, Vice-President of complaint corporation, that, "The combined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows:

	Sales	Average Net Profit
1926	$146,009,373	.0288
1927	161,099,604	.0271
1928	207,373,551	.0257"

(*Affidavit of Bonham,* Kroger record, p. 123). So far as actual data presented are concerned, it appears that it would be more accurate to say that, "Appellants' ratio of net gain to sales had never fallen below 2.5 per cent until after 1928."

If the Court will compare the following clear-cut statement of witness Martin with the confused discussion of his exhibits III to V inclusive on page 340 of the *Kroger record,* it will be possible fairly to judge of the significance of these data which are the actual figures of average operating results of hundreds of retail stores

—even though, according to appellants counsel, they are "theoretical."

> "Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.
>
> "Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores as used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.
>
> "Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable."

In connection with the Martin—Exhibit III (*Kroger record*, p. 340), it is desirable to compare appellants' counsel's discussion with the exhibit itself, even though

what appellants admit is fully sufficient to justify the position of the appellees. Appellants' counsel say:

> "Exhibit No. 3 shows the smallest merchant makes a ratio of 2.7% of net profits to net worth, while the largest merchant shown makes a net profit of 3.2% to net worth. In other words, though the large merchant makes only about one and one-half times as much on the ratio of net profits to net worth, the tax imposed is twenty times as much. . . ."

This statement is shown by comparison of the exhibit and the statute to be erroneous in two respects. (1) To take the last first, the tax is not twenty times as much, but much more than twenty times as much, though the rate is less than twenty times as high. It is impossible to say exactly how much higher the rate is, but it is probably not, at most, more than three or four times as high on the average. (2) Examination of the exhibit will indicate that the *weighted average* ratio of net profits to sales (computed directly from the third column of the table and weighted by the number of stores shown in the second column) in those cases to which the lowest rate of tax is exclusively applicable under the Act is 1.2 per cent (not 2.7 per cent) as compared with 3.2 per cent in that bracket to which a rate above .05 per cent is exclusively applicable. That bracket which is partly in the one and partly in the other area, as might be expected, shows an average that is intermediate, that is, 1.9 per cent. It is important to observe that the figures presented here are "net profits," which are the earnings *after paying the owner of the store a reasonable rate of interest,* rather than "net gains," or total net income as defined, for instance, for purposes of the federal income tax. The data for net gains were fortunately available for department stores, which, after all, are a more significant quantity than jewelry stores.

In examining Martin—Exhibit No. IV (*Kroger record*, p. 340), it is of interest to note that while appellants' counsel comment that "there are virtually two classes considered," they select figures from the one year for which three averages are reported. The assertion that the larger stores pay twenty times as much tax is again reiterated, though it is just as inaccurate here as heretofore. The exhibit actually shows an extraordinary difference between the *rate* of income on capital for large and small stores. Furthermore, as shown for all kinds of large-scale retailers in Martin—Exhibit No. XII (*Kroger record*, p. 346A), the difference is *so great* that it would take a substantially more steeply graduated tax than the Kentucky Gross Sales Tax to eliminate the profit motive so far as even *increased rate* of return is concerned; whereas the only thing necessary to induce economic activity, as pointed out by economists generally since the time of Adam Smith and as known to every business man, is that increased business should result in an increased *amount*, not necessarily an increased *rate*, of income. (Note the reiteration of this truth by defendant witness, *Affidavit of Walradt, Kroger record*, p. 306).

To inflict upon the Court a detailed discussion of the comments of appellants counsel on these first five Martin exhibits would be tedious. As a matter of fact, none of the comments reflect in the least on the substantial reliability of the evidence presented, which conclusively demonstrates the contention of the appellees that: (a) As merchants of the several classes considered enjoy a larger volume of sales, they enjoy increased taxpaying ability to an even greater extent than is recognized in the rate structure of the Kentucky Gross Sales Tax Act; and (b) this is the case whether the situation be measured in terms of relation between gross sales and net earnings or rate of net gain on invested capital. If

the average store be assumed to be selling the amount which is at the midpoint of the interval, as reported by the Harvard Bureau and used in the Martin exhibits, the following, based on a comparison of Martin—Exhibit No. I and Martin—Exhibit No. II with the statute, will be of interest (using 1929, the most abnormal year for retailing of those for which data are available):

Average Sales	Ratio of Net Gain to Net Sales	Ratio of Net Gain to Net Sales After Deducting Tax Due Under the Statute
Martin—Exhibit No. I—Specialty Stores:		
$250,000	2.8%	2.7%
1,250,000	3.0	2.6
2,500,000	5.2	4.1
Martin—Exhibit No. II—Department Stores:		
$75,000	3.0%	2.9%
225,000	2.0	1.9
400,000	2.2	2.1
625,000	3.2	3.1
875,000	3.0	2.8
1,500,000	3.1	2.6
3,000,000	3.7	2.9
7,000,000	3.9	3.0
15,000,000	5.3	4.3

From these figures and those presented in Martin—Exhibits IV and V, it is easy to show what the rate of return on net worth amounts to, assuming the same averages as above:

Typical Sales	Net Gain	Net Worth	Net Gain Less Tax	Rate of Net Gain on Net Worth After Tax
SPECIALTY STORES				
$250,000	$7,000	$107,690	$6,750	6.2%
1,250,000	37,500	326,090	32,450	10.0
2,500,000	130,000	928,570	111,950	12.1
DEPARTMENT STORES				
$75,000	$2,250	$35,710	$2,212.5	6.2%
225,000	4,500	90,000	4,337.5	4.9
400,000	8,800	146,670	8,600	5.9
625,000	20,000	294,120	19,350	6.6
875,000	26,250	397,730	24,225	6.1
1,500,000	46,500	553,570	38,450	6.9
3,000,000	111,000	1,460,530	87,950	6.0
7,000,000	373,000	4,604,940	309,950	6.7
15,000,000	795,000	7,035,400	651,950	9.3

This shows a rate of earnings after tax of somewhat less among department stores having sales of $400,000 and less than in the higher brackets, but the remarkable thing is that the graduations in rate of returns are so gentle after the application of the tax. As compared with the figures before the tax shown in Martin—Exhibits Nos. IV and V, there is a decided smoothing out in the rate, but it still is remarkably true that the greater the sales the greater the amount of net income (*Affidavit of Walradt, Kroger record*, p. 306). It could scarcely be asked that a tax law have a fairer incidence than this.

The rate structure is so construed, as set forth above, as to tax alike every retailer who is similarly situated and has the same volume of business. It is of no significance that the number of merchants who must pay the maximum rate *on some part* of their sales is small, since "a classification is not invaiid because it affects one person or corporation alone *where it is broad enough to apply to others if they exist*" (*Cooley on Taxation*, 4th ed., Vol. 1, p. 717).

Obviously the reason for application of the relatively high rates—never, however, as much as 1 per cent —to a comparatively small number of taxpayers is, of course, that there are comparatively few retailers in Kentucky who have sales in excess of $1,000,000. It is to be observed in this connection that the rate structure is so drawn (Walradt—Exhibit C, *Kroger record*, pp. 313-317) that if there were a retailer having a volume four times (or ten times) as great as the largest volume now enjoyed by any Kentucky merchant, he would have to pay a tax at a higher effective rate on sales than would any taxpayer actually affected by the statute. That is to say, the graduation is so provided that there is theoretically no maximum rate. In actual practice, there is no rate effective which would not be exceeded should the taxpayer enjoy an increase in volume of sales. To

put this whole situation in general terms, one may say that the scheme of graduation is entirely comprehensive, even though the effective rate is always less than 1 per cent (as compared with the valid maximum rates on Maine railroads under the 1881 and 1907 laws of 3.25 per cent and 5.5 per cent respectively).

Two other specific points concerning this systematic and entirely natural scheme of graduation appear to cause appellants much mental anquish. First, "Why," they say, "should thirty or forty taxpayers engaged in a legitimate business have foisted upon them the entire burden of the State's obligations?" To this complaint there are at least two entirely satisfactory answers. As a matter of *fact* (*Affidavit of Martin and Brendel, Kroger record,* pp. 100-102), appellants have shown that substantially over 11,000 merchants of the 16,000 reporting have contributed under this Act. Doubtless a considerable number of others will have to pay. This does not look like foisting the entire burden even of this tax on thirty or forty persons. Again, the proceeds of this tax are designed to pay only a distinctly minor proportion of the Commonwealth's obligations. Secondly, the appellants are concerned with the fact that competing concerns operating unit stores will pay a lower tax than will those operating very large stores but having less aggregate sales than those of the numerous unit stores. The answer to this is, of course, that this tax is imposed upon *merchants,* and any merchant enjoying a very large volume of sales must pay it. It is graduated in such way as to conform to the ability of the several *merchants* to pay the tax; and, if the Kroger Company or the J. C. Penney Company enjoys very much larger income than does the Pushins Department Store, it is obvious that the rate of tax ought to be higher than on this small department store. Under the statute this is clearly the case. That there are numerous competing

small stores enjoying a large aggregate volume is of no consequence so far as this tax and most other business taxes are concerned.

6. General Conformity of Rate Structure to Demonstrated Character of Merchandising

In summary, it may be insisted that data presented in this section have shown beyond question that the net income of retailers of each of the several classes in which there are merchants doing both a large and a small-scale business is not only larger in the case of those operating on a large scale than in the case of those operating on a small scale but is at a *higher rate* of volume of sales. It is likewise obvious from data here presented that earnings on capital invested in large-scale enterprises are not only larger in amount but actually represent a distinctly higher *rate of return* than in the case of small businesses. Indeed the *rate of return after the tax* is greater for large than for small-scale enterprises! In other words, the data presented in the Martin exhibits show the arguments so clearly and so conclusively that *it is perfectly apparent* that the larger merchant is able to pay a distinctly higher rate of tax than the smaller. It is equally clear that the scale of rates prescribed in this statute is not graduated with sufficient steepness to impose an undue burden on those subject to higher effective rates. (Martin—Exhibit 12, especially the summary, columns 10, 11 and 12, *Kroger record*, p. 346A.)

Contrary to the contention of appellants, it appears from the first Martin exhibits that retail specialty stores (Martin—Exhibit I) and department stores (Martin—Exhibit II (*Kroger record*, p. 339)—both alike in principle—enjoy not merely larger income when sales are large than when small, but actually a *materially higher rate* of net gain. More significant still, it is shown that retail jewelry stores (Martin—Exhibit III—*Kroger*

record, p. 340) specialty stores (Martin—Exhibit IV) and department stores, both chain and independent, (Martin—Exhibit V—*Kroger record*, p. 340) enjoy a *very much greater* net gain per dollar invested if sales are large than do similar stores having a small volume of sales *per annum*. The point is made clear on the second and third pages of Martin—Exhibit V that this results in the case of department stores both from increasing gross margin and, after moderate size is attained, also from declining expenses of operation. Incidentally, failure of very small stores to make any profit in excess of interest on owned capital (Martin—Exhibit V) may suggest to the Court a reason for the very low initial rates imposed in the statute attacked. Exhibits VI and VII (*Kroger record*, pp. 341-342) show, on the basis of *all* census of distribution data available when they were prepared, that national and sectional chain stores (that is, generally large-scale retailers) have higher turnover, and consequently greater taxpaying capacity—both because this means relatively profitable business, as suggested by appellant Witness Nystrom (*Kroger record*, p. 280) and because it means that these large-scale merchants pay less personal property tax on inventory in proportion to sales than do smaller-scale merchants. That these are generally large-scale retailers is borne out further (if that were necessary) by the sales per store shown in the last column of the exhibits (Martin—Exhibits VI and VII—*Kroger record* pp. 341-342). Of the two exhibits of course the most reliable is VII, which does not involve confusion between different kinds of businesses.

Thus, it is clearly in error to say that the tax act penalizes thrift and subsidizes slip-shod unprogressive merchants. As a matter of fact, this is the stereotyped argument advanced against all tax laws based on taxable capacity which are attacked by those who have substan-

tial ability to pay. According to this view, enterprise, initiative, thrift, foresight, industry, energy and progressive methods are PENALIZED, and slip-shod methods, laziness, stupidity, inertia, and poor judgment are SUBSIDIZED. It sounds very much like a slander against the patriotism of the Legislature. As a matter of actual fact it is essential, if the government is to raise revenue to carry on its functions, that the money be obtained from those who have it. Certainly it cannot be secured from those who do not have it; hence graduated taxes. It appears, therefore, that the difference between "pure theorists" who have testified for appellees and the other brand of theorists who have submitted evidence on behalf of appellants is that the latter have submitted theories fresh from their imaginations (compare for instance *Affidavit of Bonham, Kroger record*, p. 123, where appellants' witness discloses figures contradicting his pure theory to the effect that larger income does not accompany increased volume of sales), while appellees' witnesses have presented *actual facts* with respect to effective rates of this and other comparable tax laws, with respect to the operating experience of merchants, including not only department, departmentized specialty stores, and variety and general stores, but comprehending likewise data collected by the U. S. Government with respect to turnover rates generally. This difference between the manner of presenting evidence by appellants' and appellees' witnesses is doubtless the reason appellants' counsel is so very much exercised over the "complete dearth of primary facts."

IV. THE EXISTING TAX SYSTEM OF KENTUCKY TENDS TO TAX SMALL RETAILERS MORE HEAVILY IN PROPORTION TO SALES THAN LARGER ONES

1. The General Situation

If a Commonwealth raised its revenues by means of

one perfectly administered tax (in practice none are perfectly administered), inequalities would be inevitable, since no one measure of tax-paying capacity takes into account all the necessary considerations to achieve economic equality. The type of discrimination that occurs thus is, of course, not legal discrimination but economic. For example, if the Commonwealth of Kentucky imposed only a well-administered property tax, farmers and public utilities would be taxed with severity while merchants and more especially clerks and professional men would be undertaxed or not taxed at all, because the former require large amounts of property in the operation of their business, while the latter require smaller amounts or none at all. A tax *system*, therefore, must be so constructed that it will employ various measures of taxable capacity, such that all members of the community having ability to pay taxes will make some contribution to the public purse; otherwise, there will be economic inequalities in the incidence of the burden.

Under the tax system already existing prior to the enactment of the Gross Sales Tax Act of 1930, appellees have shown that, in the taxation of retail merchants, substantial inequalities existed. (Section 4 of Dr. Martin's affidavit beginning on p. 333 and pp. 359 and 360 of Dr. Phelps' statement.) In very considerable measure these inequalities are eliminated, or at least substantially reduced, by the Kentucky Sales Tax Act. It has been shown that in the larger retail stores of the several classes for which data concerning Louisville operations are available the discrimination against the smaller retailers is clear-cut; that in department stores in general the large merchant pays a substantially less proportion of his gross receipts in taxes than does the smaller one; that situation is essentially the same whether the business be carried on in multiple-unit stores or in single-unit stores; and that there are clearly definable reasons

for the existing situation. The following quotations from the affidavit of defense witness Martin will very largely serve as an explanation of the situation. (Exhibits referred to in each case are Martin Exhibits.)

"Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that the large merchant generally must pay less taxes, relatively speaking, than the small one.

"Exhibit X shows for the years 1927 to 1929 that the same conclusion applied to department stores in general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

"On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that

the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

"One other point in this connection should be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department store tends to decline with increase in the scale of operations at about the same rate whether the merchant is independent, a co-operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales." (*Affidavit of Martin, Kroger record,* pp. 334, 335.)

It remains to supplement the witness' statement only to the extent of pointing out, Martin—Exhibit 12 (*Kroger record,* p. 346A), the application of the rates prescribed in the sales tax statute will not have the effect of removing one type of discriminaton only to substitute another. Indeed it has been shown that the extent of the correction in the incidence of the tax burden is certainly not more than adequate to provide for the utilization of greater tax-paying ability on the part of the large-scale merchant. As a matter of fact, the argument that the effect of the rates will be to offset preexisting inequalities is not essential to the substantiation of the Commonwealth's position but is simply supplementary evidence having large importance, even though the graduation in the Gross Sales Tax Act is insufficiently steep to make it fully effective.

It may be worth while to emphasize one point in the defendant's *Answer* (*Stewart record,* pp. 67–69), which indicated that an economic explanation of the necessity for a graduated tax, if the tax system of the state were to approximate fairness in its incidence, was found in the fact that it offset the regressive effect of the ad valorem tax. It did not suggest that this *license* tax was a *prop-*

erty tax any more than justifying the graduation in the federal income tax (for example) in part by the fact that it offsets the *regressiveness* of the sugar tariff or the tobacco tax implies thereby that the federal income tax is an *import duty or a license tax.* The argument would be almost equally effective assuming the *legal equity* in the property tax contemplated by Section 171 of the *Kentucky Constitution.* Such adjustments by the use of more than one tax in a tax system are essential to conform to ability to pay—the generally accepted criterion of justice in taxation. In order to secure these results the Kentucky Legislature has wisely provided an *additional* tax and not a *substitute* tax. The relief from tax burdens is to be sought rather in the reduction of ad valorem tax rates, than in the subtsitution of one tax for another. Consequently Section 171 of the *Kentucky Constitution* is not even remotely involved in this discussion.

2. Reasons for the Situation Existing Prior to the Passage of the Gross Sales Tax Act

It is possible on the basis of appellees' evidence to indicate clearly the important reasons for the economic discrimination in the tax system of Kentucky as applied to retailers prior to the passage of the Gross Sales Tax Act. In the first place, it is common-place among tax students that large parcels of property are underassessed under the property tax by a larger margin than small parcels. Ordinarily this is the incidental discrimination for the correction of which there is no remedy, except in the improvement of administration. That the situation is widespread, however, is clearly shown—if indeed further showing were necessary—by two recent official publications (U. S. Department of Agriculture, *Technical Bulletin No. 172,* University of Iowa, *Studies in Business, No. 10.* Compare also U. S. Department of

Agriculture, *Progress Report of the Forest Taxation Inquiry, No. 12*).

A second important reason for the situation, existing prior to the enactment of the Act under attack, is the more rapid turnover of large-scale merchants demonstrated clearly in Martin—Exhibits 6 and 7 (*Kroger record*, pp. 341, 342). (The showing in these exhibits is substantiated with emphasis in the Harvard Bureau of Business Research, *Study of Operating Results of Department Stores in 1929*, Tables 7, 12 and 15). The following comments by appellees' witness emphasize and explain the situation.

"If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turnover, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

"In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of the total goods sold during the year than will property assessed against the small store owner.

"It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the larger store and particularly the

large multiple-unit retailer." (*Affidavit of Martin, Kroger record*, p. 333).

To this general showing the obvious fact that rapid turnover makes possible reduction of inventory on the tax date may be added. This, of course, is doubly easy for those merchants who operate a large number of stores from the same warehouse. Indeed it is simply one of the elements of efficiency about which appellants have been so insistent.

Finally the greater proportionate burden of property tax resting on small retailers as compared with larger ones results in the case of Kentucky from the fact that those large-scale merchants doing business both within and without Kentucky have, relatively speaking, a very small percentage of their property located in this State. For instance, although 1.58 per cent of the Atlantic and Pacific Tea Company's business, as measured by sales, is carried on in Kentucky, only 1 per cent of its property is found here; of the Kroger sales, 4.41 per cent are made in Kentucky, but only 2.35 per cent of Kroger's property is situated in Kentucky; the S. S. Kresge Company sales amount in Kentucky to 2 per cent of the total, but the company has only .70 per cent of its property in this State; and though Woolworth makes .80 per cent of its sales in Kentucky, it has here only .37 per cent of its property. (Martin--Exhibit 8, *Kroger record*, pp. 344, 345. A careful comparison of the last two columns in this exhibit after this fashion will reveal that the situation described is generally characteristic of the business of those retailers doing business both within and without Kentucky.) The following statement occurring in the affidavit of appellees' witness Martin will further explain the situation.

"Another strong indication that the property tax burden on large retailers is less than that on those doing a small business is provided by Exhibit VIII. A careful

comparison of the last two columns makes it clear that, with rare exceptions, the large-scale dealers doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

"An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales." (*Kroger record*, p. 334.)

In general, it is clear from the evidence that the tax system, prior to the enactment of the Gross Sales Tax Act, imposed a relatively more severe burden of taxation on small than on larger retailers; that this result was brought about by definitely ascertainable causes, which have been set forth above; and that it is corrected, at least in very large part, by the Gross Sales Tax Act.

V. COMPARISON OF TAX-PAYING ABILITY OF VOLUNTARY CHAINS OF SMALL MERCHANTS WITH LARGE-SCALE RETAILERS

Repeatedly in the theorizing of appellants witnesses the proposition is proposed that co-operative associations of small-scale retailers can secure economies of large-scale production exactly equal to those enjoyed by large-scale merchants, such as appellants. It is of some interest in this connection to find Mr. Lyons, the appellants' witness primarily relied upon in this matter, saying that, "The advantages derived by membership in the 'voluntary chains' are PRACTICALLY identical with the advantages enjoyed by the regular 'chain store.'" (*Kroger record*, p. 110.) The loophole provided here is obviously in the word *practically*. In the light of the actual data presented below, the word *practically* appears to be designed to indicate that the voluntary chain secures a position somewhat nearer large-scale retailers than does the small independent without co-operative effort. In any event the following, from the testimony of Dr. Phelps, shows very clearly what the actual facts are so far as investigations have disclosed them.

"It is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages possessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

"Professor E. Z. Palmer's survey of the prices of independent grocery stores, and chain grocery stores (the chains representing large-scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were

14.3 per cent below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3 per cent to 9.2 per cent by the average chain.

"These four most efficient independents were even being undersold three to four per cent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

"In 'A Study of the Prices of Chain and Independent Grocers in Chicago,' by Bjorklund and J. L. Palmer, published by the University of Chicago, November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: 'It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting chain prices as were certain entirely independent merchants.

"The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

"Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large-scale consolidated enterprises." (*Kroger record*, p. 358.)

In view of Dr. Phelps' statement concerning the findings in Lexington, Kentucky, it is of particular interest to observe that the Lexington market is that in which appellants particularly complain of competition from voluntary chains. The following is quoted from the affidavit of Gilbert J. Schneider of the Kroger Company (*Kroger record*, pp. 151-152).

"Independent Grocers Alliance is an important voluntary co-operative association operating in the territory over which I have supervision. Independent Grocers Alliance has some stores outside of my district in the State of Kentucky. I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every store in the state, that those merchants would fall in the highest bracket and would have to pay a 1 per cent tax. However, the members of co-operative associations pay nothing. In spite of this fact they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. They secure the benefits of mass buying, mass merchandising, mass advertising, and other economics.

"Each member is furnished with window posters and literature in regard to the proper conduct of grocery business the same as Kroger stores are furnished from central headquarters. Special merchandise broadsides and bulletins for sales campaigns are sent to members of Independent Grocers Alliance by the central headquarters. Each member of Independent Grocers Alliance has common newspaper advertising in the City of Lexington,

that is, one advertising article is inserted for all Independent Grocers Alliance stores in the City of Lexington. There is attached, a marked exhibit C, copy of an advertisement that appeared in a Lexington newspaper by Independent Grocers Alliance. The store fronts of each member of Independent Grocers Alliance bear the insignia "I. G. A." They have common store fronts and can be easily recognized as "I. G. A." stores. The central headquarters send special supervisors who co-operate with the retailer in assisting and developing of the business. These supervisors are experts who advise the retailers in regard to proper methods for increasing sales.

"Under the Kentucky Sales Tax Statute, each member of the Independent Grocers Alliance is treated as a separate unit and is not forced to aggregate his sales with the other members of the association. As a result, his deductions relieve him from the payment of any tax. Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent, and with the goods which it purchases and credited with the sales it makes. However, the Kentucky Sales Tax Statute does not treat the Kroger stores as separate units but aggregates the sales of all the stores, thus subjecting each store to a 1 per cent tax on its gross sales."

Likewise, in the affidavit of Mr. Donahue of the Atlantic & Pacific Tea Company, the competition in Lexington of the Independent Grocers Alliance is emphasized in the following language (*Kroger record*, p. 184):

"In the City of Lexington the Independent Grocers Alliance has common advertising for all of its members. Exhibit "C" is a copy of the newspaper advertising of the United Grocers Alliance in the City of Lexington, Kentucky.

"I am informed and believe that if the gross sales

of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) Per Cent on sales; that is, if they were taxed in the same manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the co-operative association, although enjoying all the benefits enjoyed by the Atlantic & Pacific stores under my supervision, pay no tax at all."

(Perhaps it is superfluous again to call attention to the error on the part of witnesses who believe a 1 per cent tax rate might apply to any business under the terms of the Kentucky law. This has been repeatedly shown to be untrue, and we have no wish to be tedious. —Compare statute with Waldradt—Exhibit No. A-1, *Kroger record*, pp. 312A-324B).

Since Lexington appears from appellants' evidence to be the market in which the voluntary chain competition is most embarrassing, it is of particular interest to find that a careful study of comparative prices (*Kroger record*, p. 358) shows that in this city the chain average is 14.3 per cent below the average for independents and *6.3 per cent below the average price charged by the most efficient independent store* in or out of a voluntary chain.

VI. THE QUESTION OF CONFISCATION

1. Situation in General in the Light of Precedent and of Merchandising Conditions

Among the allegations of appellants in their bills asking that the Kentucky Gross Sales Tax Act be declared unconstitutional and void is the proposition that the tax is confiscatory. It is the purpose of this section to show that this allegation is without foundation.

In the first place, appellees have brought before the court evidence of numerous entirely valid tax acts which

impose distinctly higher rates than those contemplated by the Kentucky statute (*Kroger record*, pp. 306-307). It has been shown that gross sales taxes are imposed in Ohio on steam railways and pipe-line companies, for example, at the rate of 4 per cent; California imposes similar taxes on public utilities at a maximum rate of 7.5 per cent (though in this case, but not in others cited, the tax is in lieu of the general property tax); France imposes a gross sales tax on the sale of practically all types of commodities (except luxuries which are subject to a very much higher rate) at the rate of 2 per cent; and Maine imposed on railroads a graduated gross sales tax ranging from .25 per cent to 3.25 per cent of gross receipts under its act of 1881. In 1907, without change in the principle of graduation, rates ranging from .5 per cent to 5.5 per cent of gross receipts were substituted for the lighter rates previously imposed. In 1927 Maine adopted the rate structure still in effect which provides that the gross receipts tax shall be graduated from 3.5 per cent to 5.5 per cent. Similar graduated gross sales taxes apply to receipts of telegraph and telephone companies (rates ranging from 1.25 per cent to 6 per cent) and to street railways (rates ranging from 1.25 to 4 per cent) in Maine.

It appears from these and numerous other cases which might be cited that the maximum rate under the Kentucky statute (amounting, gross, to approximately .95 per cent on the largest retailers doing business in the Commonwealth) is by no means out of the ordinary. Indeed in comparison with these specific cases it is obvious that the highest rates imposed in this Commonwealth are not to be regarded as relatively high rates at all.

It is of particular interest that, although the appellants make some biting remarks about the significance of these precedents, they make no attempt to offer any con-

structive answer to the insistence of appellees that these are very much heavier taxes than the tax sought to be imposed under the Kentucky Statute. The effort seems to be clear-cut to pass off these entirely valid precedents, which the courts have not found confiscatory, as of no significance, but they offer no counter evidence and submit no refutation. The most nearly arbitrary type of graduation which has been imposed, for a long while, namely, that under the gross receipts tax on public utilities in Maine—1881 and 1907 laws—appellants do not even mention. (Note that the 1881 law was sustained by this Court, *Maine* v. *Grand Trunk*, 142 U. S. 217.)

It has been shown above that there is a substantial correlation between the volume of gross sales and the amount of net income of retail merchants. Examination of Martin—Exhib. 12 (*Kroger record*, p. 346A), particularly summary columns 10, 11 and 12, and more especially 10 as compared with column 12, indicates that, far from being confiscatory in the case of concerns having the largest volume of sales, the income of the typical businesses of this type *after the tax* would approximate 12.5 per cent on net worth; in the case of businesses of intermediate sizes, the ratio of net income to net worth would range from about 9.75 per cent to 11.75 per cent; and the smallest groups of corporations, for which data are available, would receive typically a 7.75 per cent return on net worth—the last a lower rate than would be received by any of the larger-scale businesses. In studying this table, it is particularly important to compare figures in the last two columns of the body of the table, namely, those columns showing the ratio of net profit before tax to net worth with the column showing the ratio to profit after the gross sales tax to net worth. This comparison will demonstrate that in no instance does payment of the tax reduce the rate of return on capital of those concerns which are profitable to a figure which

could, by any stretch of imagination, be called confiscation. It is true, of course, that the rate of loss is made greater in the case of corporations which are already incurring a loss, but it is equally true that the state can not undertake to guarantee the profitableness of a business enterprise. The exhibit shows also that a very few enterprises making an almost negligible rate of profit show a loss after the application of the tax. But, as already stated, the tax will in no instance have the effect of confiscating the income—much less the property—of a merchant operating a profitable merchandising enterprise. To put the situation a little differently, unless a concern is already a failure the operation of this Act will not make it one.

Appellants are very much exercised about the theory, or more properly speaking *their theory*, that the statute is aimed at a very small number of fairly large-scale retail enterprises. However, an examination of the statute (Section 2) reveals that the tax is applicable to "every retail merchant," and an analysis of evidence submitted by appellants shows that large numbers of retailers are making contributions under the Act. At the time the evidence was prepared (February 12, 1931) more than 16,000 returns had been made; and that means, of course, that more than 16,000 taxpayers had paid taxes. Owing to the credits permitted under Section 4, net tax payments had been made by about 11,000 of the 16,000. (Not the *forty or fifty* about which appellants are so much concerned. *They had not made reports at all.*) It would appear from the showing of the exhibit presented by appellants that it might have been presented by appellees to show that tax contributions are made by a large number—not by the comparatively few as appellants argue.

2. Confiscation in the Case of the Kroger Company

Appellants have presented evidence (especially Mar-

tin—Exhibits Nos. 15 and 16, *Kroger record*, pp. 352-353) which make it clear that retail grocery chain stores typically earn somewhat more than the average rate of return enjoyed over the past five years by the Kroger Company. Indeed it appears that, of those doing business in Kentucky (See also Martin—Exhibit No. 13, *Kroger record*, p. 349), no others earn income on sales at as low as the Kroger Company. Martin—Exhibit No. 15 shows that in the five-year period the average earnings of four typical grocery chains, selected as such by the Harvard Bureau of Business Research, the average rates approximated 3.5 per cent. Even if the American Stores, which earned unusually high rates of return, be eliminated from the comparison the average still approximates 2.8 per cent. A similar showing is made in the more exhaustive list, selected by Moody's Investors Service as typical and presented in Martin—Exhibit No. 16.

With this showing it is of interest to compare Mr. Robert W. Lyons' (Executive Vice President of the National Chain Store Association) sworn statement to the effect that "the best managed companies in the retail grocery field were able to earn on their large volume of sales only from 1½ per cent to 2 per cent." It would also be of interest to compare this assertion with figures sworn to by Mr. John B. Bonham and incorporated in his affidavit to the effect that the average earnings of the Kroger Company over the immediately preceding four years amounted to approximately 2.6 per cent. Even this rate as shown in Martin—Exhibits Nos. 13, 14, 15 and 16 is apparently *exceeded by the average* retail grocery chain—not to speak at all of the unusually profitable ones, such, for example, as the American Stores.

In the light of Mr. Bonham's testimony that the Kroger Company enjoyed average income of approxi-

mately 2.6 per cent from 1926 to 1929 inclusive and in view of the indication of appellants that *1 per cent on its gross sales is "a fair margin for its business"* it is rather pertinent to inquire how an additional tax burden such as that imposed in the sales tax statute can constitute confiscation. Even if the statute meant an additional payment of approximately .95 per cent—and due to section 4 credits, it clearly means nothing of the kind —a reduction in the profits on sales from 2.6 per cent to 1.65—to use Mr. Bonham's more conservative figure rather than the earnings of 3.5 per cent found by the Harvard Bureau (Martin—Exhibit No. 15)—is far from confiscation. (This is especially true in view of the fact that this would still leave a rate of return on invested capital of 9.4 per cent. Martin—Exhibit No. 14.) Even this maximum rate would still leave the company about 65 per cent greater income than appellants deem fair.

It has been shown that the typical net earnings on gross sales, according to appellants' witness, in the grocery trade amount to not less than 2.6 per cent; while appellees have presented evidence leading to the conclusion that 3.5 per cent would be a more accurate representation of average earnings for the past five years for which data are available. If a table were constructed in the light of these *facts* it would be as follows:

EFFECT OF KENTUCKY SALES TAX ON PROFITS OF CONCERNS WITH VARYING GROSS SALES AND AT VARIOUS PROFITS RATES

Amount of Sales	Total Tax Payable	Net Profit of 2%		Net Profit of 2½%		Net Profit of 3%	
		Before Tax	After Tax	Before Tax	After Tax	Before Tax	After Tax
$400,000	$200	$8,000	$7,800	$10,000	$9,800	$12,000	$11,800
500,000	300	10,000	9,700	12,500	12,200	15,000	14,700
600,000	550	12,000	11,450	15,000	14,450	18,000	17,450
700,000	950	14,000	13,050	17,500	16,550	12,000	20,050
800,000	1,500	16,000	14,500	20,000	18,500	24,000	22,500
900,000	2,200	18,000	15,800	22,500	20,300	27,000	24,800
1,000,000	3,050	20,000	16,950	25,000	21,950	30,000	26,950
2,000,000	13,050	40,000	26,950	50,000	36,950	60,000	46,950
3,000,000	23,050	60,000	36,950	75,000	51,950	90,000	66,950
4,000,000	33,050	80,000	46,950	100,000	66,950	120,000	86,950
5,000,000	43,050	100,000	56,950	125,000	81,950	150,000	106,950
10,000,000	93,050	200,000	106,950	250,000	156,950	300,000	206,950
15,000,000	143,050	300,000	156,950	375,000	231,950	450,000	306,950

In other words, it is clear from the evidence submitted by the appellants, even without introducing that offered by appellees, that the Kroger fear that the Gross Sales Tax Act must have been "intended to break it up" is without foundation in fact.

3. Fairness of Tax Rate in Practice—Not Confiscatory of Property or of Major Part of Income of Any Typical Merchant

It has already been shown that the rate structure provided by the Gross Sales Tax Act is in general conformity with the facts of merchandising and that the maximum rates are not in any sense confiscatory. (Compare rate structure set out in Section 2 with Martin—Exhibits Nos. 12, summary, 13, 14, 15 and 16, *Kroger record*, pp. 346a-353.) To put the matter in another way, the rates are such as to conform approximately to the ability of the several merchants to pay taxes. In view of this fact, appellants' complaint that the Act is not a bona fide revenue measure, contrary to insistence elsewhere that it *is* purely a revenue measure, must be dismissed without very much sympathy. According to the argument presented, no progressive tax is an "honest" tax. For example, the Kentucky inheritance tax imposed at progressive rates is not "honest," since imposing a flat rate of 16 per cent on all estates (16 per cent is the maximum rate prescribed) would secure more revenue. Clearly the Gross Sales Tax Statute is not "honest" in this sense. It represents rather an effort to provide a rate structure which corresponds definitely to ability to pay, and a flat rate equal to the maximum now prescribed would not conform to the ability in the case of either the Kentucky inheritance tax or its gross sales tax.

It is entirely possible that the tax may apply to concerns making little or no profit. That a merchandising enterprise is poorly managed and consequently makes

little or no income is clearly not the concern of the legislature when it is drawing a tax measure. It must make the tax laws so that the rate structure provided will be in conformity with the *typical* facts of merchandising and of business generally. It is so drawn in fact that no substantial number of concerns will be *induced to fail* by virtue of the imposition of the tax. Evidence that the large-scale merchant is typically able to pay a higher rate of tax has been generously presented. Indeed the law of the State of Kentucky has definitely recognized this in another connection (*Gordon* v. *City of Lexington*, 138 Ky. 442).

In general, therefore, confiscation complained of in appellants' Bills is shown by the evidence to be a figment of the imagination. (1) It is clear from the statute and from appellees' evidence that the tax will not confiscate all or a considerable portion of the income of typical retail merchants even assuming that none of the tax can be shifted to consumers in higher prices. In view of this it is, of course, clear that there can be no confiscation of property. (2) It has been repeatedly shown that, contrary to the statement of appellants, no merchant will be subjected to a tax as high as 1 per cent. (3) It is obvious from the evidence presented not only that the Kroger Company will not have its property confiscated by the measure but that its income will remain to a sufficient extent to amount to over 9 per cent on invested capital (Martin—Exhibits Nos. 13, 14, 15 and 16) although Kroger shows the lowest rate of earnings on sales of any important large-scale merchant operating in this Commonwealth.

Clearly the alleged confiscation will not result from the operation of this Act.

ANALYSIS OF APPELLANTS' EVIDENCE

Evidence submitted by appellants, while occupying

a great deal of space, proves relatively little. Consequently it can be discussed briefly and disposed of without long and tedious analysis. It falls roughly into five categories:

I. EVIDENCE CONCERNING PAYMENT OF KENTUCKY WARRANTS

Appellants present in two places an affidavit of Mr. Davis of Louisville indicating that there is sometimes long delay in the payment of warrants issued by the Commonwealth of Kentucky. This matter concerns the adequacy of the remedy at law and has nothing to do with the merits of the case. Consequently this evidence will be dismissed without further comment here.

II. THE QUESTION OF FIRE AND POLICE HAZARD

Several affidavits introduced by appellants tend to show that fire and police hazards are not increased more than proportionately by appellants' businesses. Since, as agreed upon by both parties, the Act is not a police measure, this question is consequently not involved at all. The affidavits may be passed over as of no significance whatever.

III. EXPERT EVIDENCE

Appellants introduced Professor Nystrom of Columbia University, as an expert witness, and his affidavit is submitted beginning on page 278 of *Kroger record.* Speaking generally, Professor Nystrom gives a reasonably fair-minded statement of some of the issues involved in the history and economics of American retailing. His discussion of the effect of chain-store merchandising on small retailers appears to be inspired by misunderstanding of the issues involved in the case, since he deals with the proposition as though the Gross Sales Tax Act were a police measure and apparently assumes

that it is designed for purposes other than those actually stated in its title and body. Professor Nystrom like Mr. Lyons—who testifies both as an expert witness and also apparently as a representative of the chain-store interests—fall into a misinterpretation of the results of investigations carried on by the Harvard Bureau of Business Research. The net profits figures to which Mr. Lyons (*Kroger record*, p. 104) definitely refers, and similar to those for 1929 cited by Mr. Nystrom, are misleading as the witnesses quote them (though examination of Martin—Exhibit 5 will disclose that the same materials have been presented by appellees). Figures quoted by Professor Nystrom are *net profits* figures; and, like those quoted by Mr. Lyons, should be read in the light of the following quotation from *Operating Expenses of Department Stores and Departmentized Specialty Stores in* 1928, Harvard Bureau of Business Research, *Bulletin* 78, page 8, which applies to both 1928 and 1929 data.

> "The term 'net profit' as used throughout this bulletin represents a real net profit over and above salaries of proprietors, partners or executives, rent on owned real estate used in the business, and interest on the net capital investment in the business, as well as out-of-pocket expenses. Thus the net profit figure represents a true net profit on merchandising operations.
>
> "Since the interest charged on owned capital and a part of the rent charged on owned real estate were not actual disbursements, these items were credited back as interest and rentals earned, which, together with other sundry revenues, were added to net profit to arrive at the total net gain. Total net gain also is shown in Table 5 as a percentage of net worth, since many firms desire a comparison of their net earnings not only on a basis of net sales but also in relation to their actual net investment in the business."

Since the term "net gain" is synonymous with busi-

ness net income (for example, for Federal Income tax purposes), appellees have used that term, and show that the average figure which business men use (Martin—Exhibit II) in 1928 was, *according to the report used by Mr. Lyons,* on sales of:

Less than $250,000	2.3 per cent
$250,000— 499,000	3.4 per cent
500,000— 999,000	2.8 per cent
1,000,000— 1,999,000	3.8 per cent
2,000,000— 3,999,000	4.5 per cent
4,000,000—10,000,000	4.8 per cent
10,000,000 and over	5.8 per cent

At least two other executives of appellants' concerns, Mr. McKim (*Kroger record,* p. 231) and Mr. Bonham (*Kroger record,* p. 115), appear in part as expert witnesses. In the actual fact, the same may also be said of appellants' counsel, though the evidence submitted by counsel is not verified. The part of the evidence submitted by these witnesses, which appears to deserve comment, is found mostly in the testimony of Mr. Lyons.

Mr. Lyons' statement, at the top of page 109 of *Kroger record* is misleading unless it is kept in mind rather definitely that the increase in operating expenses of 5.5 per cent about which he speaks is the increase from 18 per cent to 19 per cent of sales. It is not true, as the appellees show, that the Kentucky tax amounts to 1 per cent, as Mr. Lyons suggests, and indeed *asserts* in one place.

Mr. Lyons, after discussion of the relative sizes of retail merchandising plants, asserts that the "percentage of retail merchants who do an annual volume of business of in excess of $400,000 . . . is mathematically certain to be only a fraction of 1 per cent of the total number of merchants." For aught Mr. Lyons actually shows, nothing of the kind is "mathematically certain."

In general, the evidence introduced by the appellants' experts tends to verify the contention of appellees that

large-scale merchandising, although still a minor part of the total retail business, has grown by leaps and bounds in the past several years, thus carrying on business which was formerly carried on by small independent merchants or not at all.

IV. ANALYSIS OF RETURNS TO THE KENTUCKY TAX COMMISSION

The court might assume that the analysis of returns made by Mr. Martin and Mr. Brendel have been submitted by appellees. As a matter of actual fact, the analysis indicates that, although appellees were enjoined from collecting taxes from most of the large-scale retailers, 16,000 taxpayers had made returns on or before February 12, 1931, and that more than two-thirds of these had shown net tax liability. This is rather remarkable in view of the fear of appellants that the burden of the tax would rest on "thirty or forty" taxpayers. This exhibit appears to be distinctly favorable to the appellees in that it shows so large a number of taxpayers reporting subject to a net tax.

Evidence submitted by Mr. Martin and Mr. Brendel indicates incidentally that *of those who had already filed reports* a larger number of cases in which merchants reporting more than $400,000 of sales occured in first and second class cities than in municipalities of smaller size. Appellants are very much concerned over this fact. As a matter of simple logic, however, this is a very good reason why merchants in first and second class cities, if the facts presented are representative, should pay higher rates of tax. It is important to observe that the *classification provided in the Act* is not based on the size or classification of the city but rather on the volume of sales. That it appears to be true that there is a greater number of large taxpayers situated in cities of classes one and

two—if it does *happen* to be true—is of no significance, for this is not the basis of the classification.

Having dealt at length with the evidence introduced by appellants and appellees herein, and having as we believe, conclusively refuted the assertions of fact in many instances having no bearing on the decision of the case, we shall confine ourselves to cases strictly in point. We shall refrain from quoting paragraphs of pure dicta from countless authorities. In reading the vast number of cases cited by the appellants (in the court below) we have waded through long opinions deciding questions bearing no relation whatsoever to the issues here presented, being rewarded eventually by finding in each case some paragraph of dicta, apparently pertinent on the face of it but in many instances having no bearing on the decision of the particular case and in virtually every instance none on the cases at bar.

THE LAW OF THE CASE ON THE MERITS OF THE TAX

I. THE PROVISIONS OF THE ACT ARE NOT ARBITRARY OR DISCRIMINATORY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF KENTUCKY

The Gross Sales Tax Law provides for a license tax upon all retail merchants within the Commonwealth of Kentucky, except those persons actually engaged in gardening or farming who sell their farm or garden products in this State.

The business of retailing merchandise is properly subject to classification as a unit and to impose a license tax upon retail merchants as a group does not constitute discrimination against them. *Hager* v. *Walker*, 128 Ky. 1, 107 S. W. 254; *City of Louisville* v. *Sagalowski*, 124 S. W. 339; *Schuster* v. *Louisville*, 124 Ky. 189, 89 S. W. 689; *Brown-Forman Co.* v. *Commonwealth*, 125 Ky. 402, 101 S. W. 321; *Strater Bros.* v. *Commonwealth*, 117 Ky.

604, 78 S. W. 871. Nor is the provision exempting farmers and gardeners discriminatory. On the contrary it constitutes an exercise on the part of the Legislature of its right to divide property or the subjects of taxation into reasonable classes within the purview of Section 171 of the Constitution of Kentucky, which provides as follows:

> "The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only *and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax;* and all taxes shall be levied and collected by general laws.
>
> *"The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation, etc."*

This power is recognized by the Court of Appeals of Kentucky in numerous cases, notably *Young* v. *City of Lexington* (*decided November* 7, 1930), 235 Ky. 822, wherein the Court uses the following language:

> "The sole question presented on this appeal is the validity of the license ordinance of the City of Lexington, which imposes an annual license tax of $75.00 upon the business of a 'painting contractor.' The lower court held it valid and from its judgment so adjudging this appeal is prosecuted.
>
> "Section 1 of the Ordinance imposes the tax upon 'each person, firm or corporation doing business in the City of Lexington as a painting contractor.'
>
> "Section 2 defines a 'painting contractor' as: 'each firm consisting of two or more members and each person with one or more employees.' "

In other words a person doing his own painting and not employing any one to assist him was exempted from the license tax. The Court, in upholding that ordinance, said:

> "Is the exemption of individuals, who employ no employees, made by this ordinance in question based on a reasonable classification? We are of the opinion that it is. It is common knowledge that an individual painting contractor who works for himself and has no employees is much restricted in the size and character of the work he can do in the ordinary course of affairs. He necessarily cannot take the size jobs the others can, nor can he take contracts of any size where time is an element in their completion. Even where he meets in competition a partnership composed but of two members, he, ordinarily and as a general rule, cannot do the work as speedily as a firm can, or even perhaps at all. Simple and fundamental rules of economics verify these statements. It is true that perhaps in some instances, and on some jobs, the individual working for himself may prove as efficient as some partnerships of but limited membership or even a corporation with but very few employees. But such instances will be rare, and it is sufficient if a taxing ordinance in its classification reaches and covers the general situation. It is not required to take care of isolated and exceptional individuals. *City of Louisville* v. *Sagalowski & Son,* supra; *City of Irvine* v. *Bergman,* 220 Ky. 804, 295 S. W. 1041. *It is settled that classification based on the volume of business done is based upon reasonable distinctions.* See *City of Newport* v. *Frankel,* 192 Ky. 408, 233 S. W. 884. *Since the classification made by the ordinance here in question is based upon the fundamental fact that individuals laboring for themselves as a rule cannot and in fact do not generally take jobs comparable in size and character to those taken by those who have aid in the work either from employees or other partners, it follows that after all it is based on the*

'volume of business' idea, and being so based, it is valid and not discriminatory." (Italics ours.)

A like decision was reached in *City of Louisville* v. *Sagalowski & Son* (Ky.), 124 S. W. 339, wherein the Court said:

> "It is allowed that the State or the municipality may classify even those of the same occupations, and may impose a different license tax upon each class. All that is required is that the classification shall be a natural and reasonable one, and that the tax imposed shall be the same upon all of the class. It is not necessary that a license or occupational tax shall bear the relationship of uniformity to property tax paid upon property. The constitution does not contemplate that kind of uniformity. The two phases of taxation are wholly different. The *ad valorem* system is the principal plan of taxation in this State. The license system is cumulative, and in addition to the property taxes. They are not related systems and were not intended to be measured one by the other. In the classification of callings selected as the subject of license taxes, the only limitations in the constitution are that there shall be an equality of the burden imposed on all who naturally or reasonably belong to the class, that the tax shall not be confiscatory and shall be imposed by general law for public purposes. Merchandising as an occupation may be taxed upon the license system, *but it does not follow that all merchants must pay the same license fee or that all merchants must be included. They may be separated into grades or classes, regulated by any reasonable and just consideration, which merely makes of them separate classes."* (Italics ours.)

This court has even gone a step farther and has placed its seal of approval upon a classification involving the discrimination between instrumentalities used in the same business and between the employment of men

and women. A statute of the State of Montana imposed a license fee upon hand laundries not employing more than two women and exempted steam laundries. In *Quong Wing* v. *Kirkendall*, 223 U. S. 63, Mr. Justice Holmes, delivering the opinion of the Court, said:

> "A State does not deny the equal protection of the laws merely by adjusting its revenue laws and tax system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree. *McLean* v. *Ark.*, 211 U. S. 539, 547; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 236, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562. . . . If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points to which that difference shall be emphasized by legislation are largely in the power of the State."

The constitutional authority of the General Assembly to classify retail merchants as a group, for the purpose of imposing a license tax cannot be disputed, nor can the right to exempt those who, being actually engaged in farming or gardening, sell their own produce in this State, as not belonging to that class. They occupy the position of the painter in *Young* v. *City of Lexington*, supra, and the language used in that decision is directly applicable to them.

Aside from the exception as above set out, the tax is imposed upon every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any store within the Commonwealth for the

purpose of selling goods or wares or merchandise at retail.

Regardless of the confident assertion of appellants to the contrary, this tax is aimed at no individual or group, but is purely a revenue-producing measure graduated in its operation by the volume of business done.

Appellants claim that because the classification and graduation used as a basis for the tax imposed rest wholly upon the amount of annual gross retail sales, the Act is arbitrary and hence violative of the Fourteenth Amendment to the Constitution of the United States and of the Constitution of Kentucky.

It may safely be said that no system of taxation has been more frequently employed or more often upheld than that based upon the power to tax according to the volume of business done. As stated by the Court of Appeals of Kentucky in *Gordon* v. *City of Louisville*, 138 Ky. 442, 128 S. W. 327:

> "In this State we recognize as valid the imposition of license taxes based upon three theories: one being a uniform tax upon all persons engaged in the same business, without any reference to the amount of business done; another that levies a uniform tax upon the volume of business done without changing it in proportion that the business increases, the per cent being the same whether there is realized from the business $1,000.00 or $100,000.00, per annum. And yet another is the division of the general class, as in this case and the Strater case, into separate classes according to the volume of business done, and the imposition of a different tax upon each division into which the class is divided. This last-mentioned scheme is, of course, open, as are all the others, to the objection of inequality; but the inequality is not any greater under this system than it is under the others. Of course in selecting the line that divides the general class into subdivisions

> and taxing persons coming within the provisions of each subdivision a different rating, the divisional lines are necessarily arbitrarily selected by the authorities having power to enact the tax laws as is the tax that those in each division shall pay. But this fact alone is not sufficient to condemn the Act as an unwarranted exercise of legislative authority, if the tax levied upon each class is reasonable, and the lines dividing the class appear to have been made with reasonable regard for the rights of the persons engaged in the business that is thus divided. . . . The first object in the minds of the legislative body was to tax all merchandise brokers. As a secondary condition there came the propriety of dividing them into classes based upon the volume of business done and this classification was manifestly suggested by the fact that the broker who did a small business should not be taxed as much as the one who did a large business. And so the class was divided into divisions, and a different but not unreasonable tax imposed upon each division. The requirement that the broker who does a large business should be required to pay a heavier tax than the broker who does a small business is neither unreasonable nor unjust. And to divide them into classes based on the volume of business done did not, in our opinion, violate the law of uniformity or reasonableness that has often been applied in cases like this."

The Court will bear in mind that this is not a tax on stores, but is, on the contrary, a tax on retail merchants as defined in the Act. The Act specifies that:

> "the words 'retail merchant' as used in this Act shall mean and include each person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this Act shall be construed to mean and include any store or stores

> or mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant.' "

It is, therefore, a tax on the volume of business done by the merchant regardless of whether he be an individual, firm or corporation; or whether he owns one store or many stores. The tax is imposed on the aggregate business done by him.

As far back as 1908 the Court of Appeals of Kentucky, speaking through Judge Carroll, in the case of *Hager, Auditor*, v. *Walker*, 128 Ky. 1, 107 S. W. 254, approved the principle of classification based on volume, in this language:

> "The power to tax according to the volume of business done has been upheld by this Court in *Strater Brothers Tobacco Co.* v. *Commonwealth*, 117 Ky. 604, 25 Ky. Law Rep. 1717, 78 S. W. 871, and here again the principle of uniformity was applied, the Court saying: 'We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufactures the same quantity of tobacco. The Legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the small one, based upon value of the product manufactured.'"

The Gross Sales Tax Law cannot, therefore, be assailed as arbitrary, because volume of business is the yardstick employed for measuring the amount of the tax due.

The graduated feature, as contained in Section 2 of the Act, was not arrived at capriciously or arbitrarily, but is founded upon sound economic principles, and represents a careful study of tax conditions as they exist in the various industries based upon authenticated national surveys.

This question was discussed at length by the Court of Appeals of Kentucky in *Gordon* v. *City of Louisville*, supra, wherein the Court said:

> "The only question in this case is the validity of an ordinance of the City of Louisville, reading:
>
> " 'That hereafter the following licenses shall be paid into the sinking fund of the City of Louisville for the purposes of the sinking fund, for doing the businesses, following the callings, occupations and professions, or exhibiting the articles hereinafter named, in the City of Louisville. . . .
>
> " 'Every person, firm or corporation engaged in the business of buying, selling or negotiating the purchase or sale of goods, wares and merchandise to merchants or dealers, shall be deemed a merchandise broker, and shall pay an annual license as follows: Merchandise brokers whose business amounts to $300,000 per annum shall pay a license of $50.00 per year; merchandise brokers whose business amounts to more than $200,000 and does not exceed $300,000 per annum shall pay a license of $35.00 per year; merchandise brokers whose business does not exceed $200,000 per annum shall pay a license tax of $25.00 per year.'
>
> "The appellants, who are merchandise brokers, insist this ordinance is invalid because it selects a class and then divides it into subdivisions in an arbitrary and unreasonable manner, thereby imposing upon each class a tax not equal or uniform and not based upon any reasonable principle of classification. . . . But, assuming that the council had authority to select merchandise brokers as a class for taxation, it is insisted that when so selected the tax imposed should be fixed upon such a basis as would make it uniform upon all persons engaged in the business so selected and classified for taxation. Having this proposition in mind, the argument is made that the tax imposed by the ordinance upon merchandise brokers is not equal or uniform, as this class of persons was again arbitrarily divided into different classes and a different license tax imposed

upon each class. As illustrating the inequality and lack of uniformity in the method employed in taxing the three classes into which merchandise brokers are divided, it is pointed out that under the ordinance the broker whose business amounts to $199,000 a year must pay a license fee of $25.00 per annum, while a broker whose business amounts to only $201,000 a year will pay a license tax of $35.00 per annum; that the broker whose business amounts to $299,000 a year only pays a license tax of $35.00, while the broker whose business amounts to $301,000 must pay $50.00 per annum. It is again shown that the merchandise broker whose sales amount to $1,000,000 per year is only required to pay 5 cents on each $1,000, while the broker whose sales amount to $300,000 pays 11 2/3 cents on each $1,000, and the broker whose sales amount to $100,000 and no more must pay at the rate of 25 cents on each $1,000. Inequalities exist in every scheme of license taxation that has ever been devised. It is not possible to invent a system that will operate with perfect equality upon every person upon whom the tax is imposed. This condition is recognized everywhere and by everybody. If a uniform tax was levied upon every person engaged in a certain class of business, as for instance $25 per annum upon each attorney at law, the result would be that the attorney whose income amounted to $10,000 a year, would pay the same license fee as the attorney whose income was $500 per year. And so if the tax levied upon dry goods merchants was graded according to the amount of business done by each, without distinction as to the volume, it would be equally impracticable to adjust it with absolute fairness, because one merchant whose business amounted to $100,000 a year might be required to expend three times as much in securing this volume of business as his neighbor whose sales amounted to an equal sum. Or, if the tax, as in *Strater Bros. Tobacco Co.* v. *Commonwealth,* 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717, was fixed at $1 on each $1,000 of the marketable value of the manufactured product until the value $100,000, and 50 cents on each $1,000 of the

marketable value in excess of the first $100,000, the manufacturer who produced $100,000 would pay $100, and the manufacturer who produced $300,000 in value would only pay $200. Or, in other words, the manufacturer whose product amounted to $300,000 would only pay 66 2/3 cents on each $1,000. Illustrations of this character might be multiplied without number, but the ones noted will serve to illustrate that the problem of working out equality in taxation is one that has never been solved. Acknowledging the existence of this remediless condition, the efforts of courts have been to relieve it as much as possible by requiring taxing authorities to make as little discrimination as conditions will permit."

In substantial accord is the case of *Strater Bros. Tobacco Co.* v. *Commonwealth,* 117 Ky. 604, 78 S. W. 871. An Act of the Legislature provided for a license tax upon the business of manufacturing tobacco, graduated in such manner that for the first $100,000 of business done a tax of $1.00 per thousand should be levied and that for all business in excess of $100,000, the rate should be 50 cents per thousand, as set out in the opinions above cited. This Act was upheld by the Court of Appeals as being neither arbitrary nor discriminatory, in the following language:

"The Legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured. If all manufacturers of tobacco, regardless of the manufactured product produced by each, had been made to pay the same license tax, then a more potential argument could be made against the validity of the law for lack of uniformity and inequality of burden that has been made against the law here sought to be enforced."

These Kentucky cases merely constitute re-affirmations of rules announced in earlier cases. They have

never been modified or repealed and stand as the law of this State today.

This court in numerous decisions has announced the propriety of the progressive feature in license taxes based on volume. In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, it was held that while—

> "It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power, which must be treated as wanting in due process, but the proposition disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some, if not all, of the various incomes taxes enacted prior to 1894, to which we have previously adverted."

Clark v. *City of Titusville*, 184 U. S. 329, presents a case absolutely in point which, if there were no other decisions of this Court on this point, would forever put the matter at rest. The City of Titusville, Pa., passed an ordinance imposing a licensee tax on retail merchants progressively increasing in amount upon the volume of gross sales. The scale was as follows:

Class	Business	Tax
1	Over $60,000.00	$100.00
2	$50,000 to 60,000	80.00
3	40,000 to 50,000	70.00
4	30,000 to 40,000	60.00
5	20,000 to 30,000	50.00
6	10,000 to 20,000	35.00
7	5,000 to 10,000	25.00
8	2,500 to 5,000	15.00
9	1,000 to 2,500	10.00
10	1,000	5.00

The ordinance was attacked upon the ground that the progressive scale was prohibitory and arbitrary, but this Court upheld it in the following language:

"The objection that plaintiff makes to the ordinance is, that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class 'is required to pay the same amount of taxes with the highest amount or value of property therein'; (2) that the differences are not in kind but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

"Classification by amount came up for consideration and decision in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discrimination features of the law in Illinois. We said: Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over

successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.'

"The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

" 'On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax.'

"Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

" 'If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one

over $10,000 pays not three per cent, on $10,000, but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,000 and one dollar by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither of these cases can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned.'

"Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

Similarly this Court has held valid a progressively

increasing State inheritance tax based upon the value or volume inheritance. This was done in the case of *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, cited and largely quoted from in the City of Titusville case, hereinbefore set out. The Court there uses the following language:

> "Appellant, however, says: 'The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received. . . . Under such an assumption those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of $10,000 pays 3 per cent, or $300, thus receiving $9,700 net, while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9,600.96, $99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class. Other examples might be stated.' . . .
>
> "These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree. . . .
>
> "We think the classification of the Illinois law was in the power of the legislature to make and the decree of the Circuit Court is affirmed."

This Court has gone even farther. In *Metropolis Theatre* v. *City of Chicago, etc.*, 228 U. S. 61, it sustained the right of a municipality to impose a theatre license tax increasing with the amount of admission charged, on the theory that it was, after all, a tax on volume. The wording used is interesting:

> "In other words, there is a natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice.

> The distinction obtains in every large city of the country. The reason for it must, therefore, be substantial, and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as the Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

Like decisions are to be found in the reports of virtually all of the State Courts as well as Federal. *Newton* v. *Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; *New Castle* v. *Cutler*, 156 Sup. Ct. 612; *Goldsmith* v. *Huntsville*, 120 Ala. 182, 24 So. 509; *Strater Bros. Tobacco Co.* v. *Commonwealth*, 117 Ky. 604, 78 S. W. 871; *Cowart* v. *Greenville*, 67 S. C. 35, 45 S. E. 122; *Saks* v. *Birmingham*, 120 Ala. 190, 24 So. 728; *Clark* v. *Titusville*, 184 U. S. 329, 46 L. Ed. 569, 22 Sup. Ct. Rep. 382, affirming 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; *Fickler* v. *Taxing District*, 145 U. S. 1, 36 L. Ed. 601, 4 Intes. Com. Rep. 79, 12 Sup. Ct.

Rep. 810; Ex Parte Mount, 66 Cal. 448, 6 Pac. 78; *San Luis Obispo County* v. *Greenberg*, 120 Cal. 300; 52 Pac. 797; Ex Parte Hurl, 49 Cal. 557; *Knisely* v. *Cotterel*, 196 Pa. 614, 50 L. R. A. 86, 40 Atl. 861; *Williamsport* v. *Wenner*, 172 Pa. 173, 33 Atl. 544; *Allentown* v. *Gross*, 132 Pa. 319, 192 Atl. 269.

The authorities cited above effectively refute appellants' charge that the basis of arriving at the amount of the tax due under the Gross Retail Sales Tax Law is arbitrary, and hence violative of the Fourteenth Amendment to the Constitution of the United States and the Constitution of Kentucky.

No portion of the Act has been more vigorously assailed than Section 4 thereof which reads as follows:

> "The license or excise tax levied herein, shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable and pay any special State license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this Act for the amount of such special license, excise, occupational or corporation license tax so paid, not to exceed the amount of the license or excise tax levied therein."

It is claimed that this section of the Act constitutes an unjust discrimination in favor of the small retail merchants, in that their special license, excise and occupational taxes are, in many instances more than sufficient to render them exempt from the payment of the gross sales tax. Individual retail merchants and firms, likewise claim that the Act discriminates against them in that corporations engaged in competing with them are permitted to take credit for their corporation license tax

and allege that this amounts to an unlawful discrimination in favor of their corporate competitors.

For the purposes of refuting this novel assertion, only one case need be cited—*Green* v. *E. H. Taylor, Jr. & Sons*, 184 Ky. 739, 212 S. W. 924, wherein the facts were as follows:

E. H. Taylor, Jr. & Sons was a domestic corporation engaged in the manufacture of Double Stamp Spirits. Its corporate stock consisted of $1,000,000.00 par value. The provisions of Section 4189a, Kentucky Statutes, were as follows:

> "All corporations having a capital stock divided into shares, organized by or under the laws of this or any other State or Government, owning property or doing business in this State, except . . . corporations which, under existing laws are liable to pay a franchise or license tax, shall pay to this State to be credited to the Sinking Fund, an annual license tax based upon its authorized capital stock, as hereinafter provided."

Section 4981c, Kentucky Statutes, provides that the license tax required by the preceding section should be 50c per each $1,000.00 of its authorized capital stock.

Section 4214a of the Kentucky Statutes, in force at that time, provided as follows:

> "Every corporation, association, company, copartnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey or brandy, or other species of such Double Stamp Spirits in this State, and each owner or proprietor of a bonded warehouse in this State in which such spirits are stored, shall, in addition to the taxes now imposed by law, pay to the Commonwealth of Kentucky a license tax of 2c on each proof gallon of said distilled spirits which is liable for tax to the Federal Government as shown by its official records and the amount of tax due the

State shall be thereby fixed and measured by the State Tax Commission."

The appellee made the first payment of the 2c per gallon tax provided for in Section 4214a, Kentucky Statutes, and paid the same at the proper periods thereafter throughout the entire year. During the following year a Deputy State Revenue Agent demanded of appellee to pay the license tax provided for by 4189a, supra, plus interest and penalties, for the identical period during which it had paid the license tax due under 4214a, Kentucky Statutes. The Court of Appeals in that case said:

> "The evident purpose of the Legislature, as indicated by the language of the Statutes, was to impose upon all corporations a license tax based upon their authorized capital stock, except such as it exempted from the operation of the Statute, and its purpose to exempt those corporations upon which the law at the time imposed a franchise or license tax, is just as evident. Neither could it be concluded that the Legislature intended to impose two license taxes upon such corporations as the appellee, and a Court would not be justified in construing a Statute so as to impose double taxation, unless the terms of the Statute required it. *Merchants Ice & Cold Storage Co.* v. *Commonwealth*, 154 Ky. 453, 157 S. W. 717; *Commonwealth* v. *Ledman*, 127 Ky. 603, 106 S. W. 247. . . . The tax imposed by Section 4189a, supra, is simply and purely a license tax. It is neither a tax upon the property of a corporation nor upon the value of it, but is a license required for its right to do business in the State, and its amount is in accordance with the volume of its authorized capital stock. *Hillman Iron & Land Co.* v. *Commonwealth*, 174 Ky. 759, 192 S. W. 880. The tax imposed by Section 4214a, supra, is likewise a license tax. It is not a tax upon property nor its value *but is a tax regulated as to amount by the volume of business done by the corporation, for the privilege of engaging in the manufacture of Double*

Stamp Spirits, and is imposed by Legislature, which is authorized by Section 181 of the Constitution. Raydure v. *Board of Supervisors,* 183 Ky. 84, 209 S. W. 19. Under other Statutes, such corporations as appellee are required to pay an ad valorem tax upon the value of their property, and such tax, it is presumed, is the one referred to in Section 4214a, supra, when the 2c per gallon tax is imposed in addition to the other taxes then imposed by law. The construction which is here placed upon the two Statutes 4189a and 4214a, supra, tends to preserve that equality in taxation which the constitution guarantees, and also enables force and effect to be given to the clauses of the different Statutes and prevents any repugnancy between them. Hence we conclude that appellee was liable for the license tax of 2c per gallon upon the Spirits produced by it, as provided by Section 4214a, supra, and not liable to the license tax provided by Section 4189a, supra, and the payment of the last mentioned tax was a payment of money for taxes into the Treasurer when such taxes were not due."

The foregoing effectively disposes of the claim made that Section 4 of the challenged Act is discriminatory. Section 4214a of the Kentucky Statutes provided for a license tax on the gross gallonage of distilled spirits. *The Gross Sales Tax Act provides for a license tax on the gross volume of sales of retail merchants.*

Insofar as the contention of individuals and firms that the right of a corporation to take credit for the corporation license tax paid, constitutes a discrimination in favor of the corporation and against such individual or co-partnership, let it be borne in mind that Section 4214a of the Kentucky Statutes provided that every "corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits" was liable to the 2c tax on gross gallonage, and that an individual placed as E. H. Taylor, Jr. & Sons was, could not naturally have obtained a credit

or refund of the corporation license tax provided for by Section 4189a, never having been called upon to pay, or paid such a tax. As a matter of fact this argument utterly loses its force when it is borne in mind that in reality corporations are penalized, lawfully it is true, but nevertheless penalized, for the privilege of doing business as corporations. When competing with firms or partnerships they are handicapped by being forced to pay the corporation license tax, which partnerships or individuals engaged in the same character of business do not have to pay. There is no law in this State or in any State of the Union, which prevents a partnership from incorporating itself, and if any individual or partnership resents the fact that corporations are not subjected to illegal double taxation in the Gross Sales Tax Act they can, if they choose, incorporate and themselves be allowed to take credit for the burden which their incorporated competitors have heretofore borne in competition with them.

The contention of appellants that the provisions of the challenged Act are arbitrary, confiscatory or discriminatory and, therefore, in violation of the Constitution of the United States and the Constitution of Kentucky, is completely demolished by the decision of this Court in the case of *State Board of Tax Commissioners of the State of Indiana* v. *Jackson*, 283 U. S. 527-553. The appellee, Jackson, was the owner of two hundred and twenty-five (225) retail grocery stores, all situated in the City of Indianapolis, Indiana. He had a total investment of about Two Hundred Thousand Dollars ($200,000.00), or a capital investment of less than One Thousand Dollars ($1,000.00) per store. The annual gross sales resulting from all stores was approximately One Million Dollars ($1,000,000.00). The annual gross sales of each store averaged less than Five Thousand Dollars ($5,000.00). The challenged Act provided for a

license tax upon retail stores based upon a numerical scale and depended in its graduated features upon the number of stores owned. The rates prescribed are as follows:

> "(1) Upon one store, the annual license fee shall be $3 for each such store; (2) upon two stores or more, but not to exceed five stores, the annual license fee shall be $10 for each such additional store; (3) upon each store in excess of five, but not to exceed ten, the annual license fee shall be $15 for each such additional store; (4) upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be $20 for each such additional store; (5) upon each store in excess of twenty, the annual license fee shall be $25 for each such additional store."

Under the provisions of the Act Jackson was called upon to pay the sum of $5,443.00 annually. The Act was attacked on the theory that it was arbitrary and discriminatory and that the classification was unreasonable and in violation of the Constitution of the United States and the Constitution of the State of Indiana. The position of Jackson was sustained by the trial court. In reversing the judgment, this Court used the following significant language:

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533; *Southwestern Oil Co.* v.

Texas, 217 U. S. 114, 54 L. Ed. 688, 30 S. Ct. 496; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 54 L. Ed. 883, 30 S. Ct. 578. *The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. *Rast* v. *Van Deman & L. Co.,* 240 U. S. 342, 60 L. Ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370 Ann. Cas. 1917B, 455; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192. As was said in *Brown-Forman Co.* v. *Kentucky,* supra (217 U. S. 573, 54 L. Ed. 887, 30 S. Ct. 578):

'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulations or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear.

. . . . . .

"In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like

the appellee, have found advantages in this method of merchandising and have therefore adopted it."

Under the Indiana Act, Jackson with gross sales aggregating One Million Dollars ($1,000,000.00) was called upon to pay $5,443.00 of taxes annually. Under the challenged Act in the case at bar he would be called upon to pay $3,050.00. The Indiana Act provided a tax graduated upon the number of stores owned, regardless of their size, sales, earning capacity or invested capital. The Court's approval of that Act destroys the argument of the appellants as to the validity, fairness and justice of the Kentucky Gross Sales Tax Law, which is based in its graduated features upon gross sales, since it is conclusively proven that gross sales bear a proper relation to net gain. A considerable portion of appellants' proof was devoted to the proposition that the General Assembly of Kentucky originally introduced a bill in all respects identical with the Indiana law, but that after the decision of the statutory court in the Jackson case, supra, holding that Act unconstitutional, the Legislature became afraid and redrafted the challenged Act, less stringent in its provisions but at the same time unsatisfactory to appellants. The Kentucky Act challenged by the appellants is based upon a sounder economic policy and is fairer in its provisions than the Indiana Act which was sustained by this Court.

II. THE PROVISIONS OF THE ACT ARE NOT CONFISCATORY, OPPRESSIVE OR PROHIBITORY IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF KENTUCKY

1. The Actual Rate of Taxation Under the Act

From the affidavits and exhibits of the Kroger Grocery & Baking Co., the J. C. Penney Co., the Stewart Dry Goods Co., and Levy Bros., it would appear that the

rate on dealers who have sales of $1,000,000.00 or more is 1% flat, whereas the rate on those who have only $400,000.00 to $1,000,000.00 of sales is graduated so that on the smaller the rate is 0.5% and reaches 1% on sales in excess of $1,000,000.00. The actual fact is that the rates are very much less severe than the petition implies. For example, the rate which Levy Brothers, under the Statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07 and computed the tax to be $5,499.28, would be 0.43%. Again the tax imposed on the J. C. Penney Co. would be 0.54% while that of the Stewart Dry Goods Co. would be 0.74%. Likewise, the Kroger Grocery & Baking Co. would be 0.77%. The tax rate is made considerably less than the apparent 1% by the rates on sales of less than $400,000.00 and by the offsets of license taxes which are permitted by the Statute. A table has been carefully prepared which shows how the Kentucky Gross Sales Tax is computed, and the *effective* rates of the tax from $400,000.00 of gross sales up to $12,000,000.00 of gross sales. (See Walradt—Exhibit C, *Kroger record*, pp. 313-317.) This particular exhibit is of the greatest importance and we carefully invite the Court's attention to it, for the reason that it is necessary that the *effective* rate be constantly kept in mind whenever progressive rates are used in taxation, the increased rates applying only to portions of the total sum taxed. Under the provisions of a tax such as the one in question it is natural to think only in terms of the highest rate applicable, whereas the *actual effective* rate will always be considerably lower. For instance, a retail merchant having gross sales in Kentucky over $1,000,000.00 is not taxed 1% on his gross sales, as might at first hand appear, but as a matter of fact .305% or considerably less than ½ of 1%. As a matter of fact the tax does not reach ½ of 1% until gross sales amount to $1,390,000.00, and does not reach ¾ of 1% until the

gross sales amount to over $2,700,000.00. *And it is to be borne in mind that the figures here quoted do not take into consideration the credits allowed under Secton 4 of the Act.* When such credits are taken into consideration it is unlikely that any retail merchandising enterprises in the State of Kentucky, regardless of size, would conceivably pay more than 82/100 of 1% of its gross sales.

The tax can in no case ever reach the full 1%, and no better argument in favor of the soundness and fairness of the graduated feature of this tax could be offered than the mathematical precision with which it advances in ever lessening amounts after the 1,000,000.00 gross sales point is reached. (See Walradt Exhibit C.) As stated, we particularly request the Court to carefully examine this exhibit. It will be noticed that the advances in the effective rate of the tax as the gross sales increase by $100,000.00 are small, the largest increase being only 632/10,000 of 1%, in the case of the increase in gross sales from $1,000,000.00 to $1,100,000.00. After $2,500,000.00 of gross sales have been reached the rate of increase drops rapidly. This is shown not only by Exhibit C, above referred to, but by Graph Exhibit D (*Kroger record*, p. 318A), which shows the advances in the effective rates of the Kentucky Gross Sales Tax.

That the degree of progression under the Kentucky Gross Sales Tax is not comparable in any with that appearing in the effective rates of the Federal Income tax levied on 1918 incomes is shown by a comparison of Walradt Exhibits A and B (*Kroger record*, pp. 312A and 312B), the former showing the degree of progression of the effective rates under the Kentucky Gross Sales Tax law and the latter showing the rapidity of the progression under the Federal Income Tax Law for 1918. In the preparation of these two charts the comparison is made between the operation of these two taxes upon the

same amount of gross sales under the Kentucky Act and the net income under the Federal Income tax.

A better comparison between these two taxes can be arrived at by not plotting them on a basis of the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales, and then comparing the two taxes on a purely net income basis. For this purpose charts have been prepared and filed as exhibits herein comparing the effective rates of the 1918 Federal Income tax as compared with the Kentucky Gross Retail Sales Tax, the gross sales under the latter being assumed to produce a 2% net profit. See Walradt Exhibit G; a 3% net profit, see Walradt Exhibit F, and a 4% net profit, see Walradt Exhibit E (*Kroger record*, pp. 319-322). That these estimates of 2%, 3% and 4% of net profits on gross sales are more than conservative can be seen by referring to Martin Exhibit No. 13 (*Kroger record*, pp. 347-348), which shows that the average runs better than 5% (5.3%, to be exact). Of the three exhibits above referred to, Walradt Exhibit No. E, best evidences the comparison, for this reason, but if 5.3%, the accurate figure, instead of 4% were used the illustration would be more effective. Therefore, using Exhibit E (the 4% ratio) as the standard, it will be noted that the actual increase in the tax, as computed for each bracket, is always larger for the Federal Income tax. Even in Exhibit F (the 3% ratio), which shows an abnormally small net profit on gross sales, it is always larger from $1,600,000.00 on gross sales.

If it be contended that the Fourteenth Amendment to the Constitution of the United States has no application to the Federal Income Tax Law because the restriction is imposed upon the State and not the Federal Government, it may be answered that it does not lie within the power of the Congress of the United States

to levy a Federal income or other tax which is arbitrary, confiscatory, oppressive or prohibitory, for the reason that such legislation brings the Act of Congress within the inhibition contained in the Fifth Amendment to the Constitution of the United States.

Inasmuch as the Walradt exhibits, pointing out the fact that the rate of progression under the 1918 Federal Income Tax was much sharper than that occurring in the Kentucky Gross Retail Sales Tax, have been attacked on the ground that the Federal Income Tax Laws form no just basis of comparison because the "equal protection of the laws" clause, appearing in the Fourteenth Amendment, does not appear in the Fifth Amendment, we feel that we should here point out at some length the fact that the same inhibitions are imposed upon the Congress of the United States in enacting tax laws that are laid upon the States.

The Fourteenth Amendment to the Constitution of the United States provides in part, as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

This portion of the amendment is a prohibition on all State agencies, legislative, judicial and executive. *Palestine Telephone Co.* v. *Palestine* (D. C. Tex. 1924), 1 Fed. (2nd) 349. However, State income taxes, progressively increasing in rate as volume of net income increases, imposed on the incomes of residents, and also non-residents of the State, upon income derived by them from property owned and within the State, and from any trade, business or profession carried on by them within its borders, have been held to be non-violative of this provision, although the rate of progression is as sharp as that appearing in the Federal Income Tax. *Shaffer* v.

Carter (Okl. 1920), 252 U. S. 37, 40 Sup. Ct. 221; *Travis* v. *Yale Mfg. Co.* (N. Y. 1920), 252 U. S. 60.

The Fourteenth Amendment then goes on to say—

> "nor deny to any person within its jurisdiction the equal protection of the laws."

It has been held that the right to the "equal protection of the laws" within the meaning of the above portion of the Amendment is not denied when it is apparent that the same law of course and procedure is applicable to any other person in the State under similar circumstances and conditions. *Tinsley* v. *Anderson* (Tex. 1898), 171 U. S. 106; *Williams* v. *Arkansas* (Ark. 1910), 217 U. S. 79; *Field* v. *Barber Asphalt Paving Co.* (Mo. 1904), 194 U. S. 621; *Atlantic Coast Line Ry. Co.* v. *Coachman* (1910), 59 Fla. 130, 52 Sou. 377; *Owen County Burley Tobacco Society* v. *Brumback* (1908), 180 Ky. 137, 107 S. W. 710; *State* v. *Taylor* (1909), 224 Mo. 393, 123 S. W. 892; *State* v. *Standard Oil Co.* (1909), 218 Mo. 1, 116 S. W. 902—affirmed 224 U. S. 270; *State* v. *Texas R. R. Co.* (Tex. 1912), 143 S. W. 223; *Marshall v. Foote* (Cal. 1927), 252 Pac. 1075; *Proviso School* v. *Oak Park* (Ill. 1926), 153 N. E. 369; *Stone* v. *City of Jefferson* (Mo. 1927), 293 S. W. 780; *Camden Fire Association* v. *Haston* (1926), 153 Tenn. 675, 284 S. W. 905; *State* v. *Quigg* (Fla. 1927), 114 Sou. 859. And whenever a law operates on all persons and property similarly situated "equal protection" cannot be said to be denied. *Watson* v. *Nevin*, 86 Ky. 492—affirmed 128 U. S. 582.

Nor does the "equal protection of the laws" clause of the Fourteenth Amendment prevent the classification of property for taxation—subjecting one kind of property to a different rate; distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. *Home Ins. Co.* v. *New York* (N. Y. 1890), 134 U. S. 594;

Southwestern Oil Co. v. *Texas* (Tex. 1910), 217 U. S. 114, 30 S. Ct. 496; *Michigan Telephone Tax Cases* (C. C. Mich. 1911), 185 Fed. 634—affirmed (1913) S. Ct. 833, 229 U. S. 322; *State* v. *Farmers', Etc., Sav. Bank* (1911), 114 Minn. 95, 130 N. W. 445, 851; *Magnolia Bank* v. *Pike County* (1916), 111 Miss. 857, 72 So. 697; *United New Jersey R., etc., Co.* v. *Parker* (1908), 75 N. J. Law 771, 69 Atl. 239; *Bergen, etc., R. Co.* v. *State* (1907), 74 N. J. Law 771, 67 Atl. 668; *Territory* v. *Pinney* (1910), 15 N. M. 625, 114 Pac. 367; *In re Gross Production Tax of Wolverine Oil Co.* (Okl. 1915), 154 Pac. 362; *Heisler* v. *Thomas Colliery Co.* (1922), 274 Pa. 448; 118 Atl. 394; *State* v. *Galveston, etc., R. Co.* (1906), 100 Tex. 152, 97 S. W. 71.

The provisions in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the "equal protection of the laws" was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or may not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their constitution. *Bell's Gap R. Co. v. Pennsylvania* (Pa. 1890), 134 U. S. 237, 10 S. Ct. 533.

The only rule of equality in respect to taxation under this Amendment is that it requires that the same

means and methods be applied impartially to all the constituents of each class. *St. Louis, etc., Ry. Co.* v. *Davis* (C. C. Ark. 1904), 132 Fed. 629; *Smith* v. *Stevens* (1910), 173 Ind. 564, 91 N. E. 167.

This, then, constitutes the restrictions placed upon States by the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the Constitution of the United States, insofar as they limit the taxing power of a State.

Let us now turn to the Fifth Amendment of the Constitution of the United States, which serves as a check upon the Federal Government in the imposition of Federal taxes, income or otherwise. This amendment reads in part as follows:

> "No person shall . . . be deprived of life, liberty or property without due process of law."

The "process" which is meant in this clause is *Federal* process. In *re Mahon* (D. C. Ky. 1888), 24 Fed. 525—affirmed 127 U. S. 700. See also *People* v. *Gifford* (1921), 54 Cal. Appeals 182, 201 Pac. 469; *Lewis* v. *State Board of Examiners* (1926), 162 Ga. 263; 133 S. E. 469; *Bemis* v. *Guirl Drainage Co.* (Ind. 1914), 182 Ind. 36, 104 N. E. 496; *Nectow* v. *Cambridge* (Mass. 1927), 157 N. E. 618; *New York Co.* v. *N. Y. C. & H. R. Co.* (1920), 267 Pa. 64, 110 Atl. 286, the "due process of law" clauses of the Fifth Amendment and the Fourteenth Amendment have been held to have the same identical meaning. *U. S.* v. *Armstrong* (D. C. Ind. 1920), 265 Fed. 683.

The following language shows clearly that the Fifth Amendment has been construed to place the same restriction upon the Federal Government in exercising its taxing power that the "due process of law" clause and the "equal protection of the laws" clause of the Fourteenth Amendment places upon the States. In substantiation of this, we quote the following:

"The 'due process of law' by which Congress is limited in the Fifth Amendment, and the States by the Fourteenth Amendment, is equivalent to 'the law of the land', and is intended to protect the citizen against arbitrary action, and to secure to all persons equal and impartial justice under the law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 512. It *seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose, to include the 'equal protection of the laws' which no State may deny to any person under the provisions of the Fourteenth Amendment. Lecker* v. *Texas*, 139 U. S. 462; *Giozza* v. *Tiernary*, 148 U. S. 657. Classification is allowable under these provisions of the Constitution." *U. S. Yount* (D. C. Pa. 1920), 267 Fed. 861.

It, therefore, becomes plain that if the Federal Income Tax of 1918, with its sharply progressive increase in the tax rate, accorded a citizen of the United States "due process of law" and "equal protection of the laws" under the Fifth Amendment, no valid contention can be made that the Kentucky Gross Retail Sales Act violates the "due process of law" clause or the "equal protection of the laws" clause of the Fourteenth Amendment. And it has been specifically held that the Federal Income Tax law did not violate the Constitution. In the case of *Stanton* v. *Baltic Min. Co.*, 240 U. S. 103, 36 Sup. Ct. 278, it was held that the Income Tax progressions of the Act of October 3, 1913, did not deprive a corporation of property without "due process of law" or deny *"equal protection of the laws" because of the progressive increase, nor because of deductions and exemptions allowed individuals and not corporations.*

A like holding, as applied to a gross volume production license tax exacted by the Federal Government, was reached in the case of *Pacific American Fisheries* v. *Territory of Alaska* (Alaska 1925), 269 U. S. 269, wherein

it was held that a graduated license tax imposed by the Federal Government on salmon canneries, beginning with a flat tax of 10c per case, and then imposing an additional tax of 5c per case on all cases in excess of 10,000 and not more than 25,000 produced; and an additional tax of 10c per case on all cases in excess of 25,000 and not more than 40,000 produced; and an additional tax of 15c per case on all cases in excess of 40,000 and not more than 50,000 produced; and all cases in excess of 50,000 produced an additional tax of 20c, was not an arbitrary classification denying to complainants "due process of law" or "equal protection of the laws." The Supreme Court of the United States goes on to say:

> "It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially as to contravening the 5th Amendment and denying 'due process of law.' Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its full capacity; *that there always will be an irreducible minimum of expense to be borne, whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law justly may attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights.*"

If the tax had been imposed by a State and the case had gone before the Supreme Court of the United States a like decision would have been reached, because, as heretofore set out, the Fifth Amendment to the Constitution of the United States imposes the same restric-

tion upon the Federal Government that the Fourteenth Amendment does upon the States. The language—

> "the law justly may attempt to proportion the tax to the probable gains,"

bears out the contention of appellees in the instant case, that it is entirely proper to proportion a tax to probable gains based on gross volume of business. Just because the companies whose affidavits appear in this record are not earning a net amount on their gross sales, such as the general average as shown in the exhibit, is no reason for holding the Kentucky Gross Sales Tax confiscatory. In the case of large concerns properly managed that exhibit, taken from the records on file in the State Tax Commission and other unimpeachable sources and representing a fair cross section of the large retailers in this State, shows the average net profit on gross sales to be 5.3% on business conducted throughout the nation; it shows the return on the capital investment in Kentucky, before paying the gross sales tax, to be 42.5% on the amount of property invested in this State; and after the payment of the gross sales tax according to the rates which these companies will have to pay, it shows the net return on the capital investment to average 41.2%. To say that the levying of a tax which leaves thirty-four of the largest retail merchandising enterprises in the State of Kentucky making an average of 41.2% annually on their property invested in the State of Kentucky, after payment of the tax, is confiscatory, is absurd on the face of it.

The Court will here note that both the Kroger Grocery & Baking Company and the J. C. Penney Co. appear on this chart. The chart speaks as of 1929 because of the fact that complete 1930 returns were not available at the time this case was decided by the lower court, and for the additional reason, as heretofore pointed out in

this brief, that the Kroger Co.'s earning for 1930 do not reflect the general condition of the industry, but rather are indicative of internal disaffection, mis-management, lack of efficiency, or an organized price-cutting campaign to stifle competition. A comparison of the figures embraced on that chart, with those set out in the record, will show that the Great Atlantic and Pacific Tea Company showed a substantial increase over the year 1929, whereas the Kroger Co.'s net earnings were cut to about one-third of the 1929 earnings.

It is strenuously argued in the affidavits filed on behalf of the Kroger Grocery & Baking Co. and the J. C. Penney Co., that voluntary associations of independent merchants enjoy all the benefits which accrue to large scale merchants enjoying a tremendous volume of business. It is asserted that such organizations as the I. G. A. (Independent Grocers Aliance) enable independent merchants to obtain the same purchasing discounts, rapidity of turnover, low operating expenses and high return on captal invested that large chain stores have, without being subjected to the burden of the Gross Retail Sales Tax Act, solely because they are independently owned stores.

This is a very adroit argument, but one which will not withstand an examination based upon proven facts. These voluntary associatons, lacking as they are in the capital structure and unified management and control, are wholly unable to match their large chain competitors, either in purchasing discounts or in the return on their property invested. This latter is substantiated by the charts of Dr. Martin.

Insofar as the former is concerned, no better evidence of just what these little independent co-operative associations are met with when they try to meet chain competition in buying can be afforded than the facts as they were brought out in the case of *National*

Biscuit Co. v. *Federal Trade Commission,* 299 Fed. 733. In that case the facts were as follows: The National Biscuit Co. manufactures bakery products and has a business policy of allowing the following discounts: (a) customers whose purchases from the company in a calendar month are under $15, pay list prices with no discount; (b) customers whose purchases from the company during the calendar month aggregate $15 or more, receive a quantity discount of 5% (c) customers whose purchases from the company in a calendar month aggregate $50 or more, receive a quantity discount of 10%; (d) customers whose purchases from the company in a calendar month aggregate $200 or more, receive a quantity discount of 15%; for payment in cash a 1% discount is given to all customers and no customer under any circumstances receives any greater quantity discount than 15%.

The Federal Trade Commission entered an order directed at petitioners requiring them to cease and desist

> "from giving to purchasers operating two or more separate units or retail grocery stores of chain systems a discount on the gross purchases of all the separate units or retail stores of such chain system, where the same or a similar discount on gross purchases is not allowed or given to associations or combinations of independent grocers operating retail grocery stores similar to the separate units or stores of such chain system."

The evidence showed that the National Biscuit Co. had approximately 51.6% of the entire biscuit and cracker business in this country, and that the Loose Wiles Biscuit Co., to whom a similar order was directed by the Federal Trade Commission, enjoyed 15% of the entire cracker and biscuit business in the United States. The Court, in reversing the order of the Federal Trade Commission, and thereby denying to co-operative asso-

ciations of independent gocers the right to pool the independent's purchasing power in order to obtain discount such as chain stores receive, uses the following language:

> "We conclude that the sales policy of the petitioners 'National Biscuit Co. and Loose Wiles Co.' as to their discount plan, as well as the refusal to sell co-operative or pooling buyers, is fair in all respects as to all its competitors and customers, . . . It is a practice which is recognized by manufacturers of bakery products and is inoffensive to good business morals. It was an error to direct the petitioners to sell to individual grocers who pooled their orders or purchase or who bought on a co-operative basis. . . . A manufacturer of biscuits cannot be expected to adopt a uniform policy that is appropriate to meet the small buyer and large buyer. . . . The manager of the pool, when it has a manager, merely buys as an agent or employee of the pool. He has no control over any of the various grocers in the pool. He incurs no liability. Each member of the pool controls his own business, *and is liable for his own debts.* The case is different where the sale is made direct to the manager of a chain unit. . . . For these reasons we regard the order—against each of the petitioners—as improvidently granted and the orders complained of are reversed."

The net result of this has been that co-operative associations are precluded from receiving the large purchasing discounts, which chain stores uniformly obtain. As a consequence, Dr. Martin, in his affidavit, states that a survey made in the city of Lexington, Kentucky, indicates that the most efficient of the small retailers, ***including those in the co-operative organizations in the spring of 1930 were forced to sell at price levels 3 or 4% higher than the prices charged by the least efficient large-scale retailer.***

III. THE ACT IS NOT VIOLATIVE OF ARTICLE I, SECTION 8, SUBSECTION 3, OF THE CONSTITUTION OF THE UNITED STATES, COMMONLY KNOWN AS "THE INTERSTATE COMMERCE CLAUSE"

It is claimed by appellants that the Gross Retail Sales Tax Law violates the provisions of Article One, Section Eight, Subsection Three of the Constitution of the United States, which reads as follows:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States, and with the Indian Tribes,"

because it discriminates between farmers or gardeners living without the State of Kentucky and selling their produce within said State, and those farmers or gardeners living within the State of Kentucky and selling their produce within, thereby imposing a burden on interstate commerce. To put it another way, it is contended that the law constitutes an attempt to burden, interfere with and regulate interstate trade and commerce and to levy and impose a tax upon the importation of farm and garden products raised and grown outside of the Commonwealth of Kentucky, and brought into the Commonwealth for sale in stores therein.

It has been repeatedly held, that the Interstate Commerce Clause of the Constitution has no application to sales of goods in a State when it appears that the goods were manufactured or grown in another State, shipped in quantity into the taxing State, and from there sold in retail orders by the manufacturer or producer. *Duncan* v. *State*, 105 Ga. 457, 30 S. E. 755; *Kehrer* v. *Stewart*, 117 Ga. 467, 44 S. E. 854; *Muskegon* v. *Zeeryp*, 134 Mich. 181, 96 N. W. 502; *Emert* v. *Missouri*, 146 U. S. 296, 15 Sup. Ct. Rep. 367.

The interstate commerce feature plays no part whatsoever in the constitutionality of this act, even admitting

the construction placed upon the wording of the Act by appellants.

However, if the Act either read or meant what appellants have conceived it to, as above set out, that portion of it would, in all probability, be repugnant to Amendment Fourteen, Section One of the Constitution of the United States which provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This clause of the Fourteenth Amendment has been construed to prevent a State from extending any license tax exemption to its own citizens, which is denied to a nonresident, unless the grant of exemption be founded upon some reasonable exercise of the police power. *American Fertilizer Co. v. Board of Agriculture* (Circuit Court of Appeals of North Carolina), 43 Fed. 609. There are many cases to this effect. However, the language of the Act—

> "The words 'retail merchants' . . . shall mean . . . every person . . . maintaining any . . . 'store' . . . for the purpose of . . . selling . . . merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State."—

means that persons actually engaged in gardening or farming and *selling in this State*, garden and farm products raised by them are exempt, the words "in this State" referring to the word "selling" and not to the word "raised." This portion of the sentence is not punctuated and if properly punctuated to express its meaning it would read, "except those actually engaged in gardening or farming, and selling garden or farm products, raised by them, in this State."

In other words, under a fair construction of this Act, one actually engaged in gardening or farming in the State of Ohio, or any other State of the Union for that matter, has a right to, himself sell in his store in Kentucky, farm or garden produce so raised by him, without being subject to the imposition of the Gross Retail Sales Tax Law.

Even if the language of the act were ambiguous and capable of two constructions, it is fundamental that the Court should place upon it such a construction as will uphold its validity rather than invalidate it. But aside from this, it is perfectly clear that the words "in this State" in the last part of the sentence above set out refer to "selling," just as the words "in this State" in the first part of the same sentence refer to "selling." Any other constructon would amount to a distortion of the plain language and intent of the Legislature.

In addition, it is suggested that the Act is violative of the Interstate Commerce Clause of the Federal Constitution, because the Act indirectly taxes the sale of products moving in Interstate Commerce. In other words, it is contended that certain department stores, such as Stewart Dry Goods Co., have many accounts with persons residing without the State of Kentucky, who order goods from it, either by telephone or mail. The orders are filled by shipment or delivery to these customers. We would again call attention of the Court to the language of Section 1 of the Act which provides:

> "The words 'retail merchant' as used in this Act shall mean and include every person, firm, association, co-partnership or corporation, opening, establishing, operating or maintaining any 'single store' as defined herein, for the purpose of and *selling goods*, wares or merchandise at retail in this State, except, etc."

Manifestly the foregoing language says as plainly

as words can be put, that the tax is imposed on retail merchants selling goods in this State and does not apply to sales made without the confines of the State of Kentucky, or of such a character as would come within the purview of the Interstate Commerce Clause of the Constitution; that the words "in this State" in the section above quoted refer to the word "selling" and not the word "store" is made doubly clear by the next sentence which says:

> "The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment and establishments in this State, etc."

Therefore, in the purest verbiage imaginable the Act says that a retail merchant operating a store in this State and selling goods in this State must pay a tax on his gross sales.

We do not deem it necessary to cite cases to this Court in substantiation of the proposition that a sale by a store in Kentucky to a purchaser in Kentucky has no bearing whatsoever on Interstate Commerce.

It is utterly impossible to interject the question of any burden on Interstate Commerce under the provisions of this Act, without utterly distorting the wording of the Act and destroying its plain meaning and intent.

Undoubtedly, the appellants will not deny the well established rule that the Federal Courts in construing a State statute are bound by the construction placed thereon by the highest court of the State. The validity of the challenged Act involved in the case at bar was before the Kentucky Court of Appeals in the case of *Moore et al* v. *State Board of Charities and Corrections, et al,* 239 Ky. 729, 40 S. W. (2d) 349. The constitutionality of the Act was challenged on the following grounds: (1) It denies the equal protection of the law to the various classes of

taxpayers who come within its purview; (2) It is confiscatory; (3) It violates the commerce clause of the Federal Constitution. The Court in a well reasoned opinion sustained the constitutionality of the Act and specifically decided that its provisions do not deny the equal protection of the law to the various classes of taxpayers who come within its purview, that the Act was not confiscatory and did not violate the commerce clause of the Federal Constitution. We await with interest appellants' brief to learn how they will attempt to escape the opinion of the Kentucky Court of Appeals sustaining the constitutionality of the challenged Act.

For the reasons assigned we submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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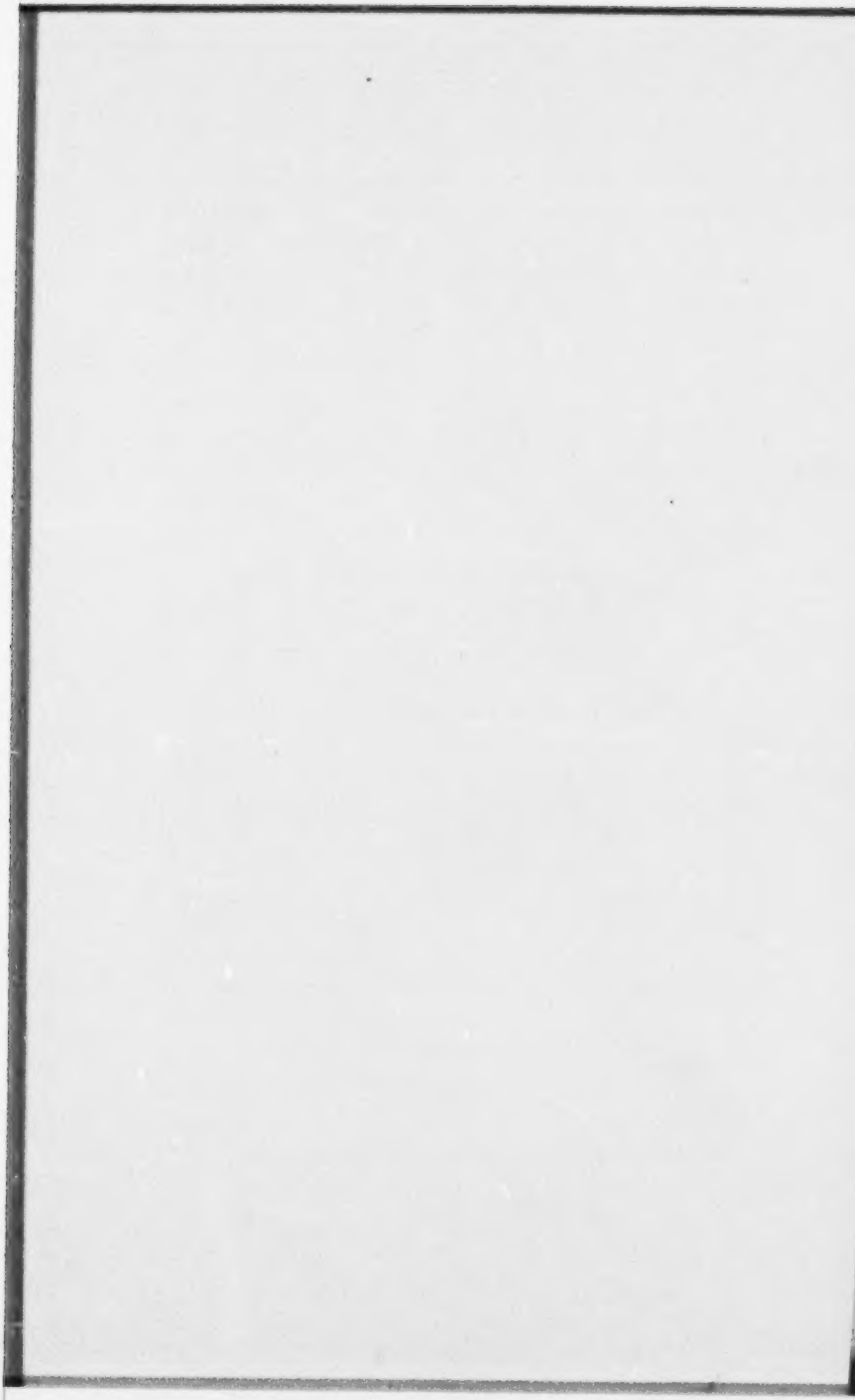

SUPREME COURT OF THE UNITED STATES.

Nos. 27, 28, 29, 30.—October Term, 1932.

27	The Stewart Dry Goods Co., Appellant, *vs.* John B. Lewis, Selden R. Glenn, et al.	Appeals from the District Court of the United States for the Western District of Kentucky.
28	Fred Levy, et al., Appellants, *vs.* John B. Lewis, Selden R. Glenn, et al.	
29	J. C. Penney Co., Appellant, *vs.* John B. Lewis, Selden R. Glenn, et al.	
30	Kroger Grocery & Baking Co., Appellant, *vs.* John B. Lewis, Selden R. Glenn, et al.	Appeal from the District Court of the United States for the Eastern District of Kentucky.

Per Curiam.

After interlocutory injunction had been granted, these cases went respectively to final hearing upon motions to dismiss the bills of complaint, and these were dismissed solely upon the ground that plaintiffs had an adequate remedy at law. The Court is of the opinion that the decision cannot be sustained merely upon the face of the statute invoked (Kentucky Acts of 1930, chap. 149, sec. 10) in view of the allegations of the bills of complaint that the only remedy provided is to obtain warrants upon the General Fund of the State in the hands of the State Treasurer to be paid if and when funds are available for the payment of such warrants in the usual and orderly course; that there are now outstanding many such warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer, which have been outstanding since June, 1927, and cannot

be collected by the owners or holders for lack of funds in the Treasury; and that there were at the time of the beginning of these suits outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, presented for payment, but not paid for lack of funds. (See *State Budget Commission* v. *Lebus*, 244 Ky. 700, 703, 714, as to warrants outstanding.) Defendants' answers denied the above-mentioned allegations, but it does not appear that there has been a hearing upon evidence of the issue tendered and no findings of fact upon the subject have been made by the courts below.

The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy. *Davis* v. *Wakelee*, 156 U. S. 680, 688; *Atlantic Coast Line Railroad Company* v. *Daughton*, 262 U. S. 413, 426.

October 24, 1932.

A true copy.

Test:

Clerk, Supreme Court, U. S.